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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

NO. ..188

W. J. DILLNER TRANSFER COMPANY, et al.
Appellants,

v.

UNITED STATES OF AMERICA et al.
Appellees

On Appeal From the U. S. District Court for the Western District of Pennsylvania.

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinion of the district court (p. 14) is not yet reported. The report of the Interstate Commerce Commission (p. 26) is reported at 79 M.C.C. 335.

### JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398 and 2321-2325 to vacate, set aside, and annul an order of the Interstate Commerce Commission. The Order of the three-judge district court was entered on April 26, 1961 (p. 25). Appellants filed notice of appeal in the district

court on May 4, 1961. The jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by *American Trucking Ass'ns, Inc. v United States*, 364 U.S.I.

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## QUESTIONS PRESENTED

The following questions are presented by this appeal:

(a) Did the District Court err in finding that Plaintiff Dillner was certificated by the Interstate Commerce Commission as a "heavy hauler and rigger" when the statutes do not give to the Commission any authority to grant such a certificate?

(b) Does Section 6(a) of the Administrative Procedure Act (5 U.S.C. 1005) permit an agency (I.C.C.) to delay its final decision in a complaint proceeding for several years and until several members of the agency who heard the oral argument have retired?

(c) Does Section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006) require an agency (I.C.C.) to produce at its own investigative hearing competent and substantial evidence to sustain the burden of proof to establish the truthfulness of accusations against a motor carrier of violations of the Interstate Commerce Act?

(d) Did the District Court err in refusing to consider all of Dillner's certificated authority even though such certificated authority is a part of the record herein?

(e) Did the District Court err in finding that as a matter of law Plaintiff Dillner was bound to sustain the burden of proof to establish that it was not guilty of violating the Interstae Commerce Act as charged?

(f) May an agency reverse the findings of a Hearing Examiner upon an important issue without making adequate findings to justify such reversal?

(g) Did the District Court err in holding that to sustain the Plaintiffs' contentions would open the door and permit the transportation of china cups and wooden nutmegs on pallets?

(h) Did the District Court err in holding that a grandfather motor carrier that is accused of illegal hauling must retry its grandfather rights case again in this proceeding?

(i) Does the Interstate Commerce Commission's rule or requirement of interpretation, regarding the determination of the inherent characteristics of commodities which may be packaged, impose an arbitrary or unreasonable burden upon the carrier and the shipping public when no person is designated to determine these characteristics before each and every shipment is made?

(j) Does the Interstate Commerce Act give to the shipping public or to the Interstate Commerce Commission the right and privilege to determine the manner and form in which commodities shall be prepared for shipment by motor carrier?

(k) Did the District Court err by failing to limit its review of the Order of the Interstate Commerce Commission to the correctness of the grounds upon which the Commission relied in issuing its Order?

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## STATUTES INVOLVED

Sections 6, 7 and 10 of the Administrative Procedure Act (5 U.S.C. 1005, 6 & 9), provide in part as follows:

> *Section 6(a)* Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives.
>
> *Section 7(c)* Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.

Section 10, of the above mentioned act, restates the applicable law of Judicial Review.

*Section 204(c)* of the Interstate Commerce Act (49 U.S.C. 304) authorizes the Commission to entertain and determine complaints against Motor Carriers for violation of the Act. The Commission may also institute an investigation upon its own motion for the same purpose.

*Section 206(a)* of the above mentioned Act (49 U.S.C. 309c) provides that no common carrier by motor vehicle shall engage in interstate commerce for hire without first having obtained a certificate from the Commission and further that such carriers that were in bona

fide operation on June 1, 1935, shall be granted a certificate without further proof of public convenience or necessity.

Appellants do not question the authority of the Commission to institute an investigation in cases where a complaint or petitions are filed against a motor carrier.

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## STATEMENT OF THE CASE

Appellant, W. J. Dillner Transfer Company, is a motor trucking concern and together with its predecessor has been in the transportation business since 1910. In 1942, the Commission issued in I.C.C. Docket 21623, its first Certificate popularly referred to as a "grandfather" irregular route certificate. The "grandfather" status of Appellant was admitted by Defendants, but they aver that such fact is not relevant or material in this proceeding. Appellant has been transporting heavy commodities, including fire brick on pallets, for many years. Defendants also admit these facts, but aver that the transportation of fire brick was illegal. Other Appellants, The Heavy and Specialized Carriers, Ace Doran Hauling and Rigging Company and Steel City Transport, have joined in this proceeding for the purpose of emphasizing the broad and important character of the litigation and to assist in protecting the interests of the so-called group of "heavy hauler" carriers.

The cease and desist Order of the Commission is a pro forma document containing no specific details and consists of only four paragraphs, as follows:

> "These proceedings having been duly submitted and full investigation of the matters and things in-

volved having been made, and the Commission, on the date hereof, having made and filed a report on oral argument herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

*It is ordered,* That respondent in No. MC-C 1766, W. J. Dillner Transfer Company be, and it is hereby notified and required on or before June 4, 1959, to cease and desist, and thereafter refrain and abstain from all operations, in interstate or foreign commerce, of the character and scope found in said report to be unlawful and unauthorized.

*It is further ordered,* That cross-defendant in the cross-complaint filed under No. MC-C 1708, Lake Shore Motor Transfer Company be, and it is hereby, notified and required on or before June 4, 1959, to cancel the tariff provision found in said report to be unlawful.

*It is further ordered,* That the complaints or cross-complaints in the other above-entitled proceedings be, and they are hereby dismissed.

By the Commission

This proceeding arose out of a controversy concerning the movement of traffic by Appellant Dillner between points in the Pittsburgh District on the one hand, and points in Ohio on the other hand. For many years past, Dillner has transported various shipments of the involved commodities sporadically but without challenge, protest or question from anyone. About March 10, 1950, at the suggestion of various shippers, Dillner decided to publish certain specific rates which among other things included the transportation of iron and steel between

points in Allegheny County on the one hand, and eighteen specific points in Michigan, five specific points in Ohio, three specific points in New Jersey, five specific points in New York and two specific points in West Virginia. Immediately upon the filing of this Tariff Supplement, the eastern railroads, including the Pennsylvania Railroad, filed a protest raising substantially the same questions that are involved in the proceeding at bar. Dillner defended the said specific rates and on April 21, 1950, Dillner received a telegram from the Secretary of the Commission stating that the Commission had sustained Dillner's position and had rejected the protests filed by the protesting railroads which read in part as follows:

> "If this item is permitted to become effective, the respondent will be able to transport iron and steel articles on the same type of equipment which is used by the carriers which are regularly transporting these commodities. It is your protestants' contention that the respondent does not have the authority to transport these articles in the manner provided for in its tariff."

Dillner continued to engage in normal transportation activities but in 1954 it became apparent to management in the course of business, that the number of points to which specific rates were published in Ohio should be increased, and also that some of the rates as specifically published were too high to meet the changing competition. Accordingly, Dillner published certain reduced rates on iron and steel to points in Ohio, and to a certain extent, met the existing competitive rates of other carriers. When these new rates were proposed, they were immediately protested by some of the competing car-

riers, but the Commission again decided that the rates were perfectly lawful and that Dillner had a right to handle the traffic. However, under all of the rates published by Dillner as above described, Dillner's tariff lacked one important item and that was a provision which was already published in the tariffs of the competitive carriers which would permit the transportation of part-lots or overflow shipments. For example, if Dillner had a call to transport 50,000 pounds of steel from Pitsburgh to Cleveland, Dillner's truck could be loaded up to its legal capacity of about 44,000 pounds, thus leaving on the dock a balance of 6,000 pounds. In actual practice, this resulted in Dillner being given only such shipments as would fit the legal carrying capacity of its trucks, while all the competitive motor carriers already had published in their tariffs a regulation which permitted the transportation of these overflow shipments on another truck and possibly combined with another shipments. Accordingly, Dillner made application to the Interstate Commerce Commission for permission to publish a Supplement upon not less than fifteen days notice, which was granted.

The overflow regulation became effective in accordance the permission granted by the Commission and Dillner was then able to engage in more active competition with other competing motor carriers. The tonnage of iron and steel offered to Dillner for transportation after the overflow rule became effective was at least 75% greater than the volume of the same tonnage offered to Dillner prior to the effective date of the overflow rule. The loss of some of this tonnage to the competing carriers motivated the filing of several complaints against Dillner. The minimum truck load weight upon

which Dillner's new rates were based was 42,000 pounds. Complaints were filed against Dillner alleging:

1. Dillner could not physically transport 42,000 pounds of iron and steel on any one vehicle or combination of vehicles.

2. Dillner had been guilty of fraud and misrepresentation.

3. Dillner had no authority to haul the commodities.

Dillner then filed a petition with the Commission praying for a declaratory order under the Administrative Procedure Act to clarify and determine the question of transportation authority. The Commission refused Dillner's petition but instituted an investigation on its own motion, based upon the complaints above cited (p. 75). When witnesses were placed on the stand by the Complainants, they admitted that they were hauling iron and steel between points in Pennsylvania and Ohio and that the average loading of their truck-load shipments of iron and steel exceeded 42,000 pounds. It is sufficient to assume that this whole proceeding was instituted because of a rate controversy.

Dillner accepted from the Commission a certificate in 1942, copy of which has been certified and handed up to the District Court. The connotation of the language used in that certificate was well-established at the time the certificate was issued. The words "heavy machinery" were well defined in the Commission's report *Classification of Motor Carriers of Property* 2 MCC 703 and affirmed more recently in *Descriptions in Motor Carriers' Certificates* 61 MCC 209, 249. This was early affirmed in *Consolidated Freight Lines, Inc. Application*

11 MCC, 131, 134. The Commission said in the above cited case that the heavy machinery group included:

> "heavy machinery, structual steel, road machinery and similar articles."

In so far as the language relating to commodities requiring special equipment is concerned, the Commission said in MC-21 reported in 23 MCC 435:

> "iron and steel articles in truckloads, minimum weight of 20,000 pounds, require special equipment."

Attention is also directed to the famous decision of the Commission in the application of *Steel Transportation Company* 44 MCC 835. This report and order clearly determines that iron and steel articles in truckloads do require special handling and special equipment to load, unload or transport.

Unless the Report and Order of the Commission is modified as sought, the practical result will be a restriction of the ability of appellants to serve the public, because no one can say with certainty just what commodities may be, lawfully, packaged and what may not. If appellants are not permitted to haul fire-brick on pallets into the steel mills, then most of their heavy flat-bed trucks must return empty for another load of steel. Such an impractical result is surely not economical and cannot be in the public interest.

After service of the Report and Order of April 10, 1959, several petitions for reconsideration were timely filed, among them being from several large shippers, such as United States Steel Corporation and E. J. Lavino & Co., but the Commission by its Order of September 23, 1959 (p. 76) adhered to its position, except that it re-

moved pipe from the proceeding. On January 13, (p. 83) 1960 the Commission made another Order denying all relief to appellants. In the above mentioned Order the Commission asserted that it had conformed to the Administrative Procedure Act. Thus the present appeal was taken to obtain review as provided by law.

**The Questions Are Substantial**

This appeal raises novel and fundamental questions that go directly to the roots of the public policy as expressed by Congress and this Honorable Court, with regard to national transportation. Concisely stated this appeal presents substantial questions:

(a) May the Interstate Commerce Commission refuse to consider all of appellants certificated authority?

(b) May the burden of proof in this quasi-criminal proceeding be imposed upon appellant or any other motor carrier?

(c) May the Court below and the Commission ignore and disregard the findings of a qualified Hearing Examiner without making adequate findings to justify such action?

(d) May the Commission make a cease and desist order restricting and impairing rights of the shipping public to adopt economical methods of packaging and shipping goods without proper findings and explaining a rational basis for such an Order?

A condition of confusion exists since the Commission announced its decision of April 10, 1959. The peculiar

formula promulgated in the above-mentioned decision is very properly characterized by Commissioner Arpaia in his dissent as requiring a "Philadelphia lawyer" to determine the meaning of it. (pp. 69-72)

On September 25, 1957 in *Dallas & Mavis Forwarding Co., Inc., Ext.*, 72 M.C.C. 653-657, the Commission held that "flat-bed vehicles" as used by "Heavyhaulers" were "Special equipment." On April 10, 1959, a radically different ruling was announced.

On October 25, 1951, in *McDade Interpretation of Certificate,* 53 M.C.C. 401, 405, the Commission defined the word "requiring" in a heavy hauling case and said:

> "It is sufficient if the commodities are such that they are customarily, in ordinary trade usage, for reasons of economy and efficiency, handled with the use of rigging and erecting equipment. We further construe the word "and," as used in the certificate under consideration, as having an alternative, rather than a conjunctive, connotation. Consequently, petitioner is authorized to transport cast-iron pipe, if such pipe cannot be handled efficiently and economically without the use of rigging equipment."

On April 15, 1949, in *St. Johnsbury Trucking, Inc., Ext.*, 51 M.C.C. 563, 571, the Commission in dealing with a similar question said:

> "The test which seems logical and controlling to us for determining whether the restriction is applicable or inapplicable in a particular instance would be whether the commodities involved are of such size or weight as could not, in the ordinary course of business, be transported, loaded, or unloaded, except by the use of equipment especially

designed for the purpose or of extra facilities suitable for loading and unloading."

It will be observed that until September 29, 1955, in *Black, Investigation of Operations,* 64 M.C.C. 433, 447, the Commission had never recognized any strange or complicated formula limiting the right of a shipper to package and ship via a "Heavyhauler" cargo of any nature. Thus the Commission has sought to now accomplish a modification of these grandfather certificates.

The appeal now at bar exemplifies an attempt to take away an important part of the operating rights of these appellants.

Unless these questions are resolved the so-called "Heavyhaulers" may be drowned in confusion and uncertainty.

## CONCLUSION

For the reasons stated and the questions presented by this appeal which are substantial and are of public importance, it is respectfully submitted that probable jurisdiction should be noted.

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## APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 60-606

W. J. DILLNER TRANSFER COMPANY
HEAVY-SPECIALIZED CARRIERS CONFERENCE
STEEL CITY TRANSPORT, INC.
ACE-DORAN HAULING AND RIGGING COMPANY
Plaintiffs

v.

THE INTERSTATE COMMERCE COMMISSION, and
THE UNITED STATES OF AMERICA
Defendants

Before STALEY, Circuit Judge, and MCILAINE and SORG, District Judges

### Opinion of the Court

(Filed April 26, 1961)

By MCILVAINE, District Judge

This is an action to enjoin, annul and set aside the report on oral argument and orders of the Interstate Commerce Commission, entered April 10 and September 23, 1959, and January 13, and August 1 and 16, 1960, in Docket No. MC-C-1766. *W. J. Dillner Transfer Co. — Investigation of Operations,* wherein the Commission construed Dillner's certificate as a heavy hauler and rigger as not authorizing the transportation of certain bundled articles of iron and steel and palletized firebrick and ordered it to cease and desist from the performance of such unauthorized operations.

In 1954 certain motor carriers petitioned the Interstate Commerce Commission, hereinafter referred to as

the Commission, to enter an order investigating certain alleged unlawful practices of W. J. Dillner Transfer Co., hereinafter referred to as Dillner. Thereafter Dillner moved to dismiss this petition and petitioned the Commission for declaratory judgment to clarify its authority.

In February 1955, the Commission by order instituted an investigation docketed as No. MC-C-1766, *W. J. Dillner Transfer Co. — Investigation of Operations*, to determine what commodities can be transported by Dillner and whether it has engaged in operations not authorized by the terms of its certificate. It would appear that under Dillner's certificate Dillner is authorized to engage as a common carrier by motor vehicle in the transportation of: *Heavy machinery and such commodities* which because of their weight and size require special equipment.

> Between points and places in Allegheny County, Pennsylvania, on the one hand, and, on the other, points and places in West Virginia, Ohio, and New York.

And by subsequent certificate was authorized to transport *such commodities* as, because of their weight or size require special equipment,

> Between points and places in Pennsylvania west of U. S. Highway 15, on the one hand, and, on the other, points and places in the southern peninsula of Michigan, Ohio, West Virginia, Delaware, New Jersey, and New York.
>
> Between points and places in Ohio, on the one hand, and, on the other, points and places in West Virginia.

The issue really before the Commission was what commodities may be transported by a motor carrier authorized to transport such commodities which because of their weight and size require special equipment. In attempting to resolve this problem, the hearings were held before an Examiner of the Commission on July 26 through 28, and October 7, 1955. There does not appear to be any complaint about the hearings.

At the hearings testimony was offered by Dillner. Following the submission of briefs the Examiner filed his proposed report in which he divided the commodities into two groups:

> GROUP I consisting of steel channels, plates strip, coils of sheet, and rolling-mill rolls, each individual piece of which is of such weight that is cannot be loaded manually, but requires a crane or other special device for loading.
>
> GROUP II consisting of steel channels, plates, sheets, bars, rods, pipe, coils, rolling-mill rolls, and firebrick each individual piece of which is not in excess of the weight and size that can be loaded and unloaded manually, without the use of a crane or other special device, but which as tendered to the carrier are in bundles or packages, or fastened on skids, in such quantity and of such aggregate weight that a crane or other special device is necessary to load the bundles, packages, and skids.

Exceptions were filed to this report by several of the parties. On October 3, 1956, the entire Commission heard oral arguments. The report of the Commission was entered on April 10, 1959, and is reported at 79 M.C.C. 335. The Commission found:

". . . the transportation of the commodities in group 1 (which were loaded and unloaded by the shipper or consignee) by . . . Dillner . . . has been and is authorized by . . . [its] certificates and is lawful . . . and that the transportation by Dillner of commodities in group 2 consisting of steel channels, plates, sheets, bars, rods, pipe, coils, rolling-mill rolls not required by the inherent nature of the commodity to be bundled in the size contemplated by group 2, and of firebrick, is not authorized by its certificate and is unlawful."

It ordered Dillner

"to cease and desist, and thereafter to refrain and abstain, from all operations in interstate or foreign commerce, of the character and scope found in said report to be unlawful and unauthorized."

Application was made for reconsideration and/or rehearing, and the Commission with minor exception denied these. Subsequent petitions for rehearing were filed and denied, and ultimately on August 1, 1960, an order of the Commission was entered fixing September 23, 1960, as the date on which Dillner must comply with the order of the Commission. Thereafter a complaint was filed in the District Court seeking to enjoin, annul and set aside the orders of the Commission referred to above. On September 27, 1960, this Court with the consent of all parties issued a restraining order pending the disposition of the case before the Court.

The issue as we see it is whether the Commission erroneously, arbitrarily or capriciously interpreted the certificate of the Dillner Company as conferring no rights to transport certain bundled articles of iron and

steel and palletized firebrick. In making the determination of this basic issue there are certain principles that we must follow. The fundamental principle is that the interpretation of a certificate issued by the Commission is best left to the Commission. *Service Transfer Co. v. Virginia,* 359 U.S. 171. And it would appear that the District Court is bound by that interpretation unless it is persuaded that the interpretation is capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law. *Malone Freight Lines v. United States,* 107 F. Supp. 946, 949 (N.D. Ala. 1952), aff'd. mem. 344 U.S. 925 (1953). This same principle has been recognized in this district in *Waite v. United States,* 161 F. Supp. 856. The Court held that its duty is to determine whether the decision of the Commission is arbitrary, capricious, or constituted an abuse of discretion or otherwise not in accordance with the law. It is to determine whether or not the Commission's order was supported by substantial evidence. The scope of judicial review is limited. The Court pointed out that the decision of the Commission carries the presumption of validity.

Counsel for Dillner urges that the burden of proof is upon the Commission, and he bases a considerable portion of his argument on such assertions. However, in the *Waite* case, this Court held that the decision of the Commission carries a presumption of validity. "Plaintiffs had the burden of showing that it is invalid because it is unjust and unreasonable in its consequences." The burden is on Dillner to show this. Dillner must show that the decision of the Commission is not based on substantial evidence.

There have been many pages of testimony taken before the Commission, voluminous briefs filed before the Commission and this Court, and extensive arguments held before the Commission and now before the Court. But the simple question is what is meant by the phrase, "such commodities as because of their weight and size require special equipment"?

The Commission found that Dillner had been transporting shipments of iron and steel articles, namely structural steel, steel plates, strips, sheets, rods, bars and tin mill products. Also certain high-temperature refractory products including brick and clay products in aggregations, packages, or pallets weighing 500 pounds or more. The Commission found that many of the iron and steel products consisted of a number of individual pieces held together in a bundle or by removable strips or other binding, which bundles weigh from 500 to 15,000 pounds or more. Dillner had been transporting such articles weighing from 2,000 to 15,000 pounds or more. The steel pieces would vary in size.

The Commission in its report went on to detail the different types of steel and the type of firebrick.

The Commission attempted to define commodities which because of their weight and size require special equipment. In determining whether the commodities sought to be transported on a flat-bed vehicle by a heavy hauler such as Dillner's is of such weight or size to require the use of special equipment for the loading or unloading, it took into account the size of the individual unit being shipped, rather than that of the aggregated load or shipment.

Dillner urges that a flat-bed trailer such as used for the transportation of steel products is special equipment. However,

> "It appears that the Commission has consistently ruled that flat-bed vehicles are not 'Special Equipment' . . . even when wooden blocks, ratchet binders, chains, sockets, bolts, and low sides are used in conjunction therewith . . . that the use of special equipment in loading and unloading is a factor to be considered in determining what commodities can be carried by so-called 'Heavy Haulers'." Willers v. United States, 133 F. Supp. 270, 274 (D.S.D. 1955).

Thus, Dillner has not shown that a flat-bed trailer is special equipment. It would appear that many of the consignors and consignees have special equipment on their loading docks for handling heavy articles. However, this would not appear to militate against a so-called heavy hauler carrying the products merely because he does not do the work. The test is what is the commodity itself to be transported, and not who does the special loading. In accordance with this view, the Commission decided that the individual unit being shipped rather than the aggregated load or shipment was the determinative factor. Obviously, steel products when bundled become very heavy. Does the bundling of special products which might be light individually convert them into commodities that would fall into the field of a heavy hauler? The Commission decided that it did not. It pointed out that the test is what is the inherent nature of the commodity itself. If the commodity required aggregation not for the mere purpose of economy and efficiency, but because of the inherent nature of the commodity, and after bundling they would become too

heavy to handle without the use of special equipment, special bundled commodities would be within the purview of an article requiring special equipment; otherwise it would not. Dillner has the burden of showing that this test that led to the conclusion of the Commission was not reasonable. We are not satisfied that he has met this burden, and the Commission on the other hand has pointed to many of its decisions in which it has set forth its analysis of aggregation of shipments.

The question of whether Dillner had the right under its existing certificates to transport palletized firebrick presented a difficult question. The decision of the Commission which denied Dillner the right to transport this firebrick demanded careful scrutiny by the Court. The examiner found that the inherent nature of the product demanded it be palletized and consequently within Dillner's authority. The Commission disagreed; and at first glance their findings in this regard seemed in conflict. However, a careful reading of the testimony shows their final conclusion to be based on substantial evidence. They could well have found that firebrick was exclusively handled by the railroads prior to 1950; that they could be hauled unpalletized and, in fact, some are so hauled; that convenience and saving labor and costs are the main consideration in palletizing this commodity. Sufficient evidence was present to allow reasonable men to find that this commodity did not through its inherent characteristics demand that it be hauled only *after* it was placed on pallets. The testimony of the witness, Bischel, appears to be controlling on this issue. It was more than a mere scintilla of evidence in support of the Commission's findings. The findings were based on substantial evidence even though there was some evidence

to the contrary. The test is not whether on this issue this Court agrees with the majority or the minority view of the Commission. It is simply whether the majority view was based on substantial evidence. We find it to be properly supported.

Actually with the modern advances in palletizing articles for economy and ease in handling articles by truck, the Commission was faced with a knotty question. To accept the minority view could well have extended the heavy haulers' certificates to cover the hauling of china cups or wooden nutmegs, a contention not advanced by petitioners herein. The Commission's test is a reasonable test, and firebricks fit into an acceptable slot.

Dillner also urges that the report of the Commission is at variance with the examiner's recommended report and, therefore, it is arbitrary, capricious, and unlawful.

The United States Court of Appeals for this circuit has pointed out that as a general rule a Commission's findings should be given much weight in cases in which they have specialized and intimate knowledge of the whole proceedings. However, they point out that a slightly different rule is applicable when a final determination by the Administrative Agency *rejects* the findings of a hearing examiner. It would appear that an examiner's report is not as unassailable as a master and can be reversed by the Commission. The reviewing court while it need not give a trial examiner's findings more weight than they deserve in the light of reason and judicial experience, they should be accorded the relevance that they reasonably command in answering

the over-all question whether the evidence supporting the Commission's order is substantial. See In Re United Corporation, 249 F.2d 168.

An examination of the proposed report of the examiner and the report of the Commission indicates that there was not a substantial variance in the two reports. The examiner felt that Dillner ought to be permitted under Group II to transport aggregate loads of steel plates, steel sheets, and firebrick. The Commission found that the transportation of these commodities except as to the bundling of sheets and plates were required by their inherent nature was beyond the scope of Dillner's authority.

The Commission concluded that steel sheets and plates which could be handled individually and were palletized or packaged not because of necessity, but because of efficiency and economy was insufficient reason to hold that their transportation required special equipment. A conclusion was reached on firebrick. It would appear that their main difference was in determining which overall products were aggregated due to their inherent nature and which overall products were aggregated for economy purposes. The Commission set forth in its report wherein it differed with its examiner. It is clearly set forth where it differed from its examiners, and that is all it is required to do. We might point out that the difference here did not go to the credibility of witnesses in a situation in which the examiner's opinion ought to be given considerable weight but rather its interpretation and meaning of terms and the Commission's decisions in those cases are for the Commission rather than for the Examiner in the final instance. And, of course, there is no rule that holds that the Commission

may not differ from its hearing examiner. See Zinett v. United States, 136 F. Supp. 37.

Dillner also complains that the Commission did not consider its so-called grandfather clause. From the brief filed by the Commission, it would appear that this was not referred to by the Commission. However, it appears that Dillner did not prior to June 1, 1935, and continuously thereafter transport packaged articles of iron and steel and palletized firebrick. The Commission was construing Dillner's rights and had there been evidence that Dillner was transporting this material prior to June 1, 1935, and had the Commission failed to consider it, it would present a different problem. However, in view of the fact that Dillner offered no evidence as to its "grandfather operations" we do not see why it was incumbent upon the Commission to consider this.

Basically, the burden is upon Dillner to prove that the order and report of the Commission was clearly erroneous, capricious, and arbitrary, and not supported by substantial evidence. We do not feel that Dillner has met the burden imposed by law. It is not our function to set aside the report merely because we might or might not differ with the Commission. We must act when we find that the report and order is not supported by substantial evidence. The burden is upon Dillner to prove this to the Court. It has not met this burden of proof, and, therefore, an appropriate order will be entered dismissing the complaint.

**Order**

AND NOW, to wit, this 26 day of April, 1961, it is Ordered and Directed that the complaint of W. J. Dillner Transfer Company, Heavy-Specialized Carriers Conference, Steel City Transport, Inc., and Ace-Doran Hauling and Rigging Company to set aside, enjoin, and annul the report of the Interstate Commerce Commission entered at MC-C-1766 on April 10, 1959, should be and hereby is denied, and the complaint is dismissed.

s/ AUSTIN L. STALEY
Circuit Judge

s/ JOHN W. MCILVAINE
District Judge

s/ HERBERT P. SORG
District Judge

## APPENDIX "B"

## INTERSTATE COMMERCE COMMISSION

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**No. MC-C-1766[1]**

**W. J. DILLNER TRANSFER COMPANY—INVESTIGATION OF OPERATIONS**

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*Decided April 10, 1959*

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**Report of the Commission on Oral Argument**

BY THE COMMISSION:

The title proceeding, and No. MC-C-1708 and the two cross complaints filed thereunder, were heard on a consolidated record. These and two related proceedings, No. MC-C-1767 and a cross complaint filed thereunder which were heard on a separate record, were all the subject of a proposed report by an examiner. Exceptions and replies thereto were filed by numerous parties to the examiner's proposed report, and the parties have been hard in oral argument. Our conclusions differ in some respects from those recommended.

The title proceeding is an investigation instituted by us under section 204(c) of the Interstate Commerce

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1. This report embraces No. MC-C-1708, Dennis Trucking Company et al. v. W. J. Dillner Transfer Company and the cross complaints thereunder, W. J. Dillner Transfer Company v. Lake Shore Motor Transfer Company, and W. J. Dillner Transfer Company v. Long Transportation Company, and No. MC-C-1767, Hess Cartage Company et al. v. W. J. Dillner Transfer Company, and the cross complaint thereunder, W. J. Dillner Transfer Company v. Lattavo Brothers, Inc.

Act to determine, (1) whether respondent W. J. Dillner Transfer Co., hereinafter called Dillner, lawfully may transport, from and to points specified in its certificates, structural steel and shipments of other commodities which are in packages or pieces of such size or weight as to require mechanical power to load or unload them, or which require special vehicles including specially equipped flat beds for their transportation, and (2) whether Dillner has been and is engaged in transporting other commodities not within the scope of its operating authority, in violation of section 206(a) of the act or of any requirement, restriction, term, or condition of its certificates, wth the view to making such determination of these issues, and entering such order, or orders, if any, and taking such other action, as the facts and circumstances may warrant.

At the hearings complainants, in No. MC-C-1708, requested that their complaint be dismissed, and the cross complainant, Dillner, requested dismissal of its cross complaints against Long Transportation Company and Lattavo Brothers, Inc., filed under Nos. MC-C-1708 and MC-C-1767, respectively. No one opposes these requests, and as there appears to be no need for a determination of the issues presented therein, we shall dismiss these complaints by an appropriate order without further discussion or consideration here.

By a cross complaint in No. MC-C-1708, filed March 9, 1955, Dillner alleges that Lake Shore Motor Transfer Company, hereinafter called Lake Shore, is a motor common carrier operating under a certificate authorizing it to transport general commodities, except commodities requiring special equipment, between points in New York, Ohio, and Pennsylvania; that for several years

Lake Shore has been, and is now, engaged in the transportation of steel and other heavy commodities which require special equipment, in unlawful competition with Dillner, between the Pittsburgh, Pa., district and points in New York and Ohio; that Lake Shore has substantially abandoned operations as a carrier of general commodities and now holds itself out to the public as a specialized carrier of heavy commodities without proper authority; that Lake Shore operates a fleet of heavy flat-bed vehicles designed and equipped for the transportation of heavy commodities which require special equipment; that Lake Shore publishes a special tariff devoted exclusively to rates and regulations relating to heavy shipments of iron and steel; that Lake Shore holds itself out by a rule in its tariff to provide any special service or equipment necessary to handle heavy or bulky shipments if the shipper or consignee so desires it, at a flat charge, such tariff being governed by rules 21 and 22 of the National Motor Freight Classification which defines a heavy shipment as any piece or package exceeding 500 pounds in weight, and that Lake Shore is operating in violation of the act and depriving Dillner of traffic in heavy commodities which are within the scope of Dillner's operating rights. An order requiring Lake Shore to cease and desist from the alleged unlawful operations is sought.

No. MC-C-1767 is a complaint filed August 25, 1954, by Hess Cartage Company, 12 other motor carriers, and the Association of Highway Steel Transporters, Inc. It alleges[2] that Dillner established commodity rates on

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2. Those allegations which now are moot because of our decision in No. MC-C-1510, *Iron and Steel Articles—Eastern Common Carriers*, and related proceedings, 68 M.C.C. 717, will not be set forth or discussed herein.

structural steel and iron and steel articles requiring special equipment, minimum 42,000 pounds, from Pittsburgh, Pa., to certain Ohio points which are lower than the rates of complainants and other motor carriers; that when said rates were filed an effective rule in Dillner's tariff defined a shipment as any quantity of freight tendered on one bill of lading at one time, and provided that overflow freight, in excess of that which might be transported on one vehicle at one time and as one load, should be treated as a separate shipment for the purpose of determining rates and charges; that protests against the proposed rates were filed upon the ground that the minimum weight lawfully could not be carried on a single vehicle; that in justification of said rates Dillner tacitly admitted that the proposed minimum weight would not legally be transported on a semitrailer, but represented that it could be carried on a combination of a truck and full trailer which equipment Dillner represented it had available; that this representation was false and misleading because Dillner did not own any full four-wheel trailers and all transportation rendered by it has been and is being rendered with semitrailers; that effective July 16, 1954, Dillner republished, under special permission obtained as the result of false and misleading information, the same rates, minimum 42,000 pounds, making the described rule inapplicable in connection therewith; that Dillner did not transport any iron or steel article shipments at rates subject to the 42,000 pound minimum weight prior to July 16, 1954; that since that date Dillner has been engaged in the transportation of shipments at that minimum weight using principally, if not wholly, semitrailer equipment which under Pennsylvania law, cannot legally carry 42,000 pounds; that

shipments at the tariff minimum weight of 42,000 pounds must be carried in two vehicles by Dillner; that Dillner has not engaged in the transportation of iron and steel articles which because of their weight and size require special equipment but has engaged, almost exclusively, in the transportation of iron and steel articles which do not require special equipment and which have been actually transported by Dillner on standard flat-bed semitrailers and without special equipment; that by reason of the described reduced rates Dillner has been able to divert from complainants and other authorized carriers substantially all shipments of iron and steel articles originating at plants of the United States Steel Corporation and destined to the Ohio points; and that the transportation by Dillner of shipments of iron and steel articles not requiring special equipment is being made without any tariff provision therefor and is unlawful under section 217(d) of the act. Complainants pray for such relief as they may be entitled to in the premises.

In the title proceeding, No. MC-C-1766, the Heavy and Specialized Carrier Section of the Local Cartage National Conference, Inc., hereinafter called the Heavy Carrier Section, intervened in support of respondent Dillner. The Common Carrier Conference—Irregular Route and the Regular Common Carrier Conference of the American Trucking Associations, Inc., hereinafter called the Irregular Route Conference and the Regular Route Conference respectively, Motor Carriers Tariff Bureau, Inc., the eastern territory railroads, and about 60 individual motor common carriers intervened in opposition to Dillner. Except for the Motor Carriers Tariff Bureau, Inc., and about 12 individual motor carriers, the interveners in this proceeding also intervened in No. MC-C-1767.

## EXAMINER'S RECOMMENDATIONS

After an extensive discussion of tl.e pertinent facts, the examiner, in his report, divided the commodities to which the evidence related into two groups, as follows:

> Group 1 consisting of steel channels, plates, strip, coils of sheet, and rolling-mill rolls, each individual piece of which is of such weight that it cannot be loaded manually, but requires a crane or other special device for loading.
>
> Group 2 consisting of steel channels, plates, sheets, bars, rods, pipe, coils, rolling-mill rolls, and firebrick, each individual piece of which is not in excess of the weight and size that can be loaded and unloaded manually, without the use of a crane or other special device, but which as tendered to the carrier are in bundles or packages, or fastened on skids, in such quantity and of such aggregate weight that a crane or other special device is necessary to load the bundles, packages, and skids.

The examiner found, among other things, that Lake Shore lawfully may transport all of the group 1 and group 2 commodities and that Dillner lawfully may transport all group 1 commodities and all group 2 commodities except steel channels, bars, pipe, coils, and rolling-mill rolls. He recommended that we enter an order (1) requiring Dillner to cease and desist from the transportation of the last-named articles (2) requiring Lake Shore to cancel its tariff rule providing charges for the loading and unloading of heavy and bulky articles requiring special devices for safe loading and unloading by Lake Shore because that carrier cannot lawfully transport such commodities unless the loading and unloading

are performed by the shipper or receiver, or both, and (3) dismissing the complaints and cross complaints in all other respects.

## EXCEPTIONS, REPLIES, AND ARGUMENTS

The exceptions to the examiner's report are comprehensive and represent many conflicting views. In substance, however, the views expressed and the points pressed on oral argument have as their focal point the important and complex question of what commodities may be transported and what service may be rendered by the so-called heavy hauler and by the general-commodity carrier. Specifically, the Motor Carriers Tariff Bureau, Inc., contends that the examiner erred in including some articles in both commodity groups, and in making the method of loading and unloading of importance. Eclipse Motor Lines, Inc., and seven other motor carriers say that the examiner should have found that Dillner has no authority to haul any cnmmodity in a steel flat or any other ordinary equipment unless Dillner is required to furnish special equipment for loading and unloading.

Hess Cartage Company and 32 other interveners urge that Dillner's service consists of nothing more than the transportation from factory to plant without carrier use of special equipment for loading, unloading, or otherwise. They contend that the examiner erred (1) in not concluding that the certificates of Dillner and Lake Shore are, as concerns commodity authorization, mutually exclusive, (2) in failing and refusing to conclude that the "special equipment" referred to in both Dillner's certificate and the certificates of general-commod-

ity carriers relates to the requirements made upon the carrier and not to any service required or performed by the shipper, and (3) in failing or refusing to find that Dillner willfully and knowingly misrepresented to the Commission that the republication of certain rates would make no changes in rates but would merely consolidate into one supplement all then effective changes from the original tariff. Baltimore and Pittsburgh Motor Express Co., and a number of other carriers argue that iron and steel articles are beyond the scope of Dillner's authority and that it should be unequivocally found that Dillner holds no authority to transport firebrick.

The Regular Route Conference contends that a heavy hauler performs a specialized, unusual, or extraordinary service beyond that provided by a general-commodity carrier holding authority restricted against the transportation of commodities requiring special equipment; that a "type-of-service" principle might be used to define the limits of heavy-hauler operations; and that since nothing in the transportation of iron and steel products or palletized firebrick demands or requires any extraordinary service by the carrier, such transportation is within the authority of the general-commodity carrier and beyond that of a heavy hauler, such as Dillner. It argues that to hold that the mere act of packaging, bundling, or palletizing a commodity removes the transportation thereof from the authority of the general-commodity carrier would result in a constant attrition of the latter carrier's rights and a corresponding expansion of the rights of heavy haulers.

The Irregular Route Conference requests us to find that the certificate of Dillner authorizes only the transportation of heavy machinery or commodities which

because of their size or weight require the services of a carrier which maintains and operates equipment specially designed for such transportation, and that shippers should not have unlimited discretion to determine by aggregation and method of tender whether special equipment is needed. It urges a return to the doctrine enunciated in *St. Johnsbury Trucking Co., Inc., Extension — Heavy Hauling,* 53 M.C.C. 277, hereinafter called the *St. Johnsbury* case, and that the examiner be overruled as to the group 2 commodities.

The eastern territory railroads represent that the transportation performed by Dillner is identical with that performed by general-commodity motor carriers, including regularity of movements; that the loading and unloading of the named commodities are performed entirely by the shipper and receiver; and that since the transportation is performed with ordinary flat-bed truck or trailer equipment, it follows that Dillner is not authorized to transport the named iron and steel articles and refractory products.

Dillner contends that the examiner erred in commencing the hearing without acting upon the issue of prejudice raised by it in violation of the Administrative Procedure Act; and that he further erred (1) in failing to find that the order of investigation was predicated upon false and fraudulent statements presented to the Commission on behalf of certain complainants, (2) in failing to find that the charges against Dillner were false and unfounded, (3) in failing to find that Lake Shore was and is unlawfully engaged in the transportation of iron and steel in truckloads of 20,000 pounds or more, from steel mills in the Pittsburgh district direct to consignees in Ohio, (4) in failing to quote portions of

certain reports of this Commission, (5) in misquoting part of its (Dillner's) authority, (6) in failing to quote rules 21 and 22 of the Motor Freight Classification, (7) in stating at sheet 8 of his proposed report that "prior to that date it (Dillner) was not transporting this traffic" (8) in failing to hold that the "flat beds" used by Dillner are of the same kind or type of vehicles mentioned in the *St. Johnsbury* case and that the complaints so allege and two stipulations so state, and, (9) that flat-bed trailers which must be built to support a concentrated weight of 1,000 pounds per square foot or more are special equipment and should be so identified. It urges that the results herein are controlled by *Steel Transp. Co., Inc., Extension—Wisconsin,* 44 M.C.C. 835, hereinafter called the *Steel Transportation* case.

The Heavy Carrier Section urges (1) that the examiner's conclusions and findings are not supported by the evidence, (2) that the examiner erred in stating that all of the commodities to which the evidence relates have been and are transported, as tendered by the shippers, on flat-bed trucks, flat-bed full trailers, and flat-bed semitrailers of the size, construction, weight, and equipment commonly used for the transportation of general commodities, (3) that the examiner erred in stating that these vehicles are not equipped with winches or other devices for loading or unloading, (4) that the examiner erred in not considering the commodities on the basis of their individual size, weight, shape, or inherent nature, (5) that his conclusion that Lake Shore lawfully could transport group 1 and group 2 articles indiscriminately is erroneous because its certificate precludes the transportation of any articles that require the use of special equipment, and (6) that the

group 1 and group 2 articles are of such size, shape, weight, or inherent nature, when tendered to Dillner, as to "require" the use of special equipment for loading, unloading, or transportation, and (7) that complainants submitted no evidence to the contrary and Dillner had the right to perform and to continue to perform such transportation under his present certificate.

*Dillner, in reply to all of the exceptions, except* those filed by the Heavy Carrier Section, contends (1) that all exceptants, except the latter, have distorted or at least misinterpreted the facts, (2) that it (Dillner) was "holding out" and actually was transporting steel on March 1, 1950, (3) that the record does not support the statement that flat-bed vehicles are commonly used by general-commodity carriers for the transportation of general commodities, and (4) that steel traffic requires the use of flat-bed equipment.

The Heavy Carriers Section replied to the exceptions of the eastern territory railroads, the Irregular Route Conference, Hess Cartage Company and others, and the Regular Route Conference. It asserts that the eastern territory railroads are incorrect in stating that the individual commodities involved do not require mechanical loading or any special transportation facilities; and that the transportation services performed by Dillner are identical with the service which is rendered by general-commodity carriers. In reply to the exceptions of Hess Cartage Company and others, it maintains that overlapping authority between general-commodity carriers and heavy haulers is essential as a matter of public convenience and necessity. In reply to the exceptions of the Regular and Irregular Route conferences, it contends

that refractory or other products of such "inherent nature," cannot be safely or properly transported by means other than "special equipment" in the form tendered and in which form the public demands they be transported and handled.

Hess Cartage Company and 32 other motor carriers replied jointly, and the Regular Route Conference replied separately, to the exceptions of Dillner and the Heavy Carriers Section. These replicants contend that, once shed of all references to matters not of record, the described exceptions merely claim (1) that flat-bed trailers are special equipment, and (2) that Dillner's operations are lawful because the commodities are generally loaded by cranes or other mechanical equipment. They say that these claims are without merit, and they request that Dillner be ordered to cease and desist from the transportation of iron, steel, and refractory products.

The eastern territory railroads, in reply to the exceptions of the Heavy Carriers Section, says (1) that the record adequately supports the conclusion of the examiner that the commodities involved herein have been transported on flat-bed vehicles and that such vehicles are not equipped with winches or other devices for loading or unloading, and (2) that there is no evidence of record to support the argument that the commodities in group 1 and group 2 are of such size, shape, weight, or inherent nature that they require the use of special equipment for their loading, unloading, or transportation. The reply of the eastern territory railroad to the exceptions of Dillner also contains a motion to strike those exceptions on the grounds that rule 1.96(a) of our

General Rules of Practice has been violated, because (1) the document is general in nature and argumentative and makes only two specific references to the examiner's report, (2) Dillner has excepted to certain conclusions but failed to separately number and state the points relied upon to support these exceptions, and (3) in its exceptions to a statement of fact Dillner has failed to incorporate a corrected statement. Dillner's exceptions, although general and argumentative for the most part, are numbered and do reveal with sufficient clarity its objections to the examiner's proposed report. The motion to strike will therefore be denied. This is not to say, however, that these exceptions are all that they should be, and counsel filing these exceptions is admonished that compliance with our rules of practice is imperative to orderly and expeditious procedure. On the merits, these railroads contend that the only real exceptions taken by Dillner are allegations that the examiner misquoted its (Dillner's) authority, and that the examiner erred in stating that prior to June 20, 1954, Dillner was not transporting iron and steel articles. Replicants further contend that the latter exceptions are without merit since Dillner stipulated it began this transportation on or about July 16, 1954; and that all other alleged errors are not supported by the evidence of record and should be disregarded.

## THE PERTINENT FACTS

The evidence adduced, the examiner's recommendations, the exceptions, and the replies thereto have been considered; and we find the statement of facts in the examiner's report to be sufficiently accurate for a determination of the issues here presented. As herein-

after amplified in the following summation of those facts necessary for a clear understanding of the issues, we adopt that factual statement as our own.

The allegations in No. MC-C-1767 are either now moot as the result of our recent decision in No. MC-C-1510 or are not supported by sufficient evidence to warrant findings in favor of complainants therein. In the circumstances, we shall dismiss the complaint in that proceeding. This action, coupled with the dismissal of the complaint against Dillner in No. MC-C-1708 and of Dillner's cross complaints against Long Transportation Company and Lattavo Brothers, Inc., considerably narrows the matters before us for determination. At issue now is whether or not Dillner and Lake Shore have been and are transporting commodities not authorized by their respective certificates. Since there is no allegation or contention that either Dillner or Lake Shore is performing transportation beyond the territorial scope of their respective certificates, we shall not, in our ensuing discussion, deal with any particular points of origin or destination.

Dillner is authorized to transport such commodities which because of their weight and size require special equipment, and thereunder has been transporting shipments of certain iron and steel articles; namely, structural steel, plates, strip, sheets, rods, bars, shapes, and tin mill products, also certain high-temperature refractory products including brick and clay products in aggregations, packages, or pallets weighing 500 pounds or more. Lake Shore is authorized by its presently held certificate to transport general commodities, with certain exceptions including an exception of commodities

requiring special equipment, and thereunder it has been transporting the iron and steel articles set forth above.

Many of the iron and steel shipments consist of a number of individual pieces held together in a bundle or by a removable metal strip or strips or other binding, which bundles weigh from 500 to 15,000 pounds or more. The bundles of such articles which have been and are transported by Dillner each weigh from 2,000 to 15,000 pounds or more.

The individual pieces of steel vary greatly in size and weight. Pieces of structural steel range, for instance, from a long and relatively wide girder weighing many thousands of pounds down to a relatively short, narrow, and light channel. Generally, structural steel consists of shaped or fabricated pieces having a leg of 3 inches or more. A steel channel, one side of which is 3 inches or more in width, is considered a piece of structural steel. Steel channels of lesser width may range in length to 24 feet or more and may weigh up to 130 pounds each. As shipped, several such channels usually are wired or otherwise fastened together.

Steel plates range from 4 to 8 feet or more in width and up to 30 feet in length and 2 inches in thickness. The weight of a single plate ranges up to 2,000 pounds.

Strip steel ranges up to 12 inches in width, over an inch in thickness, and many feet in length. Each piece usually is so heavy, ranging up to several thousand pounds in weight, that it is handled individually.

Sheets range in size from about 2 to 12 feet in length, from 2 to 12 feet in width and up to about three-sixteenths of an inch in thickness. If of greater thick-

ness, it is called a plate. Sheets are bundled flat. The bundles range up to 12 inches in thickness and weigh from 2,000 to 15,000 pounds; they are fastened with steel bands or straps. Some sheets are covered with a protective coating of oil and must be tied together to prevent slipping. Such sheets are fastened with temporary mill ties while being moved within the steel mill to prevent sliding and injury to workmen. Some bundles of sheets are wrapped in waterproof paper for protection. The steel mills make extra charges for bundling steel in packages weighing less than 10,000 pounds each. They also make extra charges for wrapping.

Bars range in length from about 12 inches to 50 feet and, when round, up to 3 inches in diameter, or, when flat, from a quarter of an inch to 3 inches in thickness and up to 3 inches in width, and may weigh from 50 to 60 pounds each. They are shipped fastened together with wire, in bundles, which weighs up to 5,000 pounds each.

Pipe of small diameter is usually fastened in bundles.

A steel coil is a long strip or piece of steel rolled into a coil. It is called hoop or bank steel when the strip is not over 2 inches in width, strip steel when from 2 to 6 inches in width, and sheet steel when over 6 inches in width. It generally is 8 to 24 gage in thickness. Individual coils range in weight from 75 to 40,000 pounds, coiled sheets which range up to 8 feet in width being the heaviest. The lighter weight coils are fastened together on skids, with sometimes from 20 to 25 coils on a skid. Coils which are not fastened to skids are placed on the vehicles cylindrically between 4 by 4 pieces of wood.

Coils cannot safely be rolled on or off a vehicle like a barrel.

Rolling mill rolls vary in size and weight from 150 to 20,000 pounds each.

The bundling, packaging, or fastening on skids, of steel articles are performed by the shippers at the request of the receivers for safety and efficiency in handling at the steel mills and the receivers' plants, and not for the convenience of the carriers.

Firebrick is made in various sizes and shapes to fit the construction of the inside of furnaces and ladles, the average size being 2½ by 4 by 9 inches. The bricks are loaded on wooden pallets about 3 by 4 feet in size, in layers approximately 30 inches high. Each pallet weighs between 2,800 and 3,500 pounds. From 10 to 14 pallets are loaded on a flat-bed trailer. Firebrick is valuable and somewhat easily damaged. It is palletized to save labor costs, to promote convenience in handling, and to protect it from chipping and cracking. If chipped or cracked it is rejected by the receiver. Both the shippers and receivers insist that firebrick be handled and transported on pallets. If not palletized, it would have to be packed in straw or in small packages.

The shipments of iron and steel articles are loaded by the consignors with cranes or other electrical or mechanical devices owned and operated by them, and at their expense and risk; and they are unloaded with similar devices owned and operated by, and at the expense and risk, of the receivers. Dillner's tariffs do not require iron and steel articles to be bundled in the manner described. Its line-haul rates include loading and unloading only when such services can readily be per-

formed by one man, but where the use of rigging or special loading or unloading equipment is necessary because of the weight, dimensions, or physical characteristics of pieces or packages, such services may be performed, or arranged for, by and at the expense of consignor or consignee.

Most large receivers of iron and steel articles unload the shipments by mechanical devices. Though there has been an increasing trend toward the use of such devices over the years, some of the smaller receivers still unfasten bundled commodities and unload them by hand. Sometimes the articles are skidded or pulled off the vehicles without use of mechanical power, and in other instances, rollers are used to unload.

Lake Shore's tariff provides that shipments of iron and steel articles must be loaded and unloaded by the consignor and consignee; and that when such services are performed by the carrier a charge is made. It has never been called upon to perform such loading and unloading services. Lattavo Brothers, Inc., at times, has employed crane operators or heavy haulers, at the shipper's expense, to unload steel transported by it.

Pallets of firebrick are loaded and unloaded by the shippers and consignees by use of Hyster trucks. When loaded angle irons furnished by the carrier are placed on the outside top edges of the top layers of brick, and chain binders are placed across the angle irons to fasten the pallets firmly to the vehicle; the carrier performs this fastening. Occasionally a consignee unloads the brick one or two at a time by hand labor.

All shipments of iron and steel and firebrick transported by Dillner have been and are loaded by the con-

signors and unloaded by the consignees at the expense and risk of such consignors and consignees.

The vehicles used by Dillner, Lake Shore, and the motor-carrier interveners in transporting iron and steel articles and refractory products consist of flat-bed trucks or trailers equipped with a headerboard or bulkhead and steel rods, skids, chains, and binders as set out in the Motor Carrier Safety Regulations and more particularly described in an agreement between motor carriers engaged in the transportation of iron and steel articles as set forth in the release of August 24, 1949, by the secretary of the Commission.

A representative of a trailer manufacturer stated that he sold trailers to Dillner, and that there are no particular standards in such trailers. He referred to them as heavy-duty trailers made for handling heavy commodities such as steel which impose a concentrated load on the trailer floor. The record shows, however, that the vehicle floor need not be specially braced or of unusual construction. Steel shippers nevertheless prefer heavy flat-bed vehicles with reinforced floors in the interest of safety in loading, unloading, and transportation. The loading of high-side and low-side vehicles with a crane endangers the men who are in the vehicle directing the crane operator. Many of the motor-carrier interveners have safely transported iron and steel articles in both open-top and closed vans. Less-than-truckload shipments have been skidded into such vans.

Lake Shore and various intervener general-commodity motor carriers use flat-bed trailers of the size, construction, weight, and equipment as described above for the transportation of general commodities including

lumber, building blocks, brick, cement, sand in bags, plasterboard and other construction materials, cement pipe, asbestos pipe, and numerous other palletized articles or materials, and they have so used such equipment, for such purposes, for 8 years or more. A number of the vehicles used by Dillner, at least since July 16, 1954, are owned and operated by owner-operators, who, at least prior to this date, transported iron and steel articles for one or more of the motor-carrier interveners under similar owner-driver lease arrangements.

## DISCUSSION AND CONCLUSIONS

Aside from the numerous procedural and argumentive digressions of the parties hereto, which play no significant or helpful part in a determination of the real issues here in controversy, the matters which stand out as the crux of the overall problem may be identified as follows, (1) whether the vehicles utilized by Dillner and Lake Shore because of their construction or reinforcement are "required" and if so are they "special equipment," (2) whether and the extent to which the aggregation or bundling of individual iron and steel articles and firebricks brings the resulting bundle or aggregation within the scope of the operating authority of a so-called heavy hauler, and (3) whether as a result of bundling or aggregation of iron and steel articles, and firebrick otherwise capable of manual loading and unloading, the so-called general-commodity carrier loses its right to engage in their transportation.

For a better understanding of these issues some background concerning the development of heavy haulers as a separate and specialized group should be

discussed. Generally speaking, from the beginning of motor-carrier regulation the heavy hauler was conceived to be and was treated as a carrier who operated special equipment with rigging designed to load and move heavy and bulky commodities often requiring specialized handling by persons accompanying the driver. Underlying the frequently liberal grants of State and multiple-statewide certificates to heavy haulers, there was an understanding that the operations of such carriers were relatively sporadic in movements which usually fell into no continuous or repetitive pattern. Thus in the early days there was no indication that the heavy hauler was a competitor of the general-commodity carrier from whose authority the transportation of commodities requiring the use of special equipment was usually specifically excluded. As will be seen from the subsequent discussion of cases, this concept has been subjected to a gradual erosion by grants of broader ranges of commodities and by interpretations of operating rights, particularly as to the carriers' methods of operation. As a result there has come to be recognized a so-called twilight zone under which both types of carriers have participated in some of the same traffic. This has been due, to some extent, to evolution in the methods of handling certain classes of traffic.

Before turning to the specific case-by-case discussion of the present problem, it should first be noted that at the outset of regulation the Commission recognized that motor carriers generally could be divided into groups according to the types of service rendered and as early as August 1937, in *Classification of Motor Carriers of Property,* 2 M.C.C. 703, 17 different classes of property carriers were identified. In almost all instances,

however, such classes were partly for convenience but principally from necessity described in terms of the *commodities* transported, rather than in terms of the *service* rendered. In framing grants of operating authority the same procedure generally has been followed with the *service* authorized being identified by reference to the commodities authorized to be transported. The *Classification* case identified the heavy haulers as "Carriers of heavy machinery." In granting authority to such carriers the usual practice was followed and the service authorized was described in terms of the commodities to be transported, though such service steadily evolved beyond the mere transportation of machinery. Early forms of authority varied somewhat, but the following are typical: Heavy machinery; heavy and cumbersome commodities; commodities requiring special equipment; commodities requiring special handling or the use of special equipment; commodities requiring rigging or the use of special equipment; and such commodities as require special equipment and handling because of their weight and size.

With this background we turn to specific cases, considering first the *Steel Transportation* case, *supra,* (decided February 3, 1945, not printed in full) relied upon by Dillner, as controlling of the decision herein. In that case division 5 stated:

> We have not previously defined the term special equipment insofar as the transportation of iron and steel is concerned, but *it may reasonably be inferred that the term comprises such equipment as is not in general use by authorized transporters of commodities generally,* including the ordinary, every-day run of iron and steel products. With possibly a few

individual exceptions, motor carriers of general commodities, including a preponderance of iron and steel articles, do not utilize as ordinary equipment such devices as pole trailers, special bulkheads, racks, dollies, cradles, and other devices designed to enable long, rigid or semirigid articles to be transported around curves. The distinction between ordinary and special equipment merely on the basis of the lengths of individual vehicles is somewhat less obvious. * * * [protestant general commodity haulers are indicated generally not to maintain equipment longer than 28 feet] * * * We conclude, therefore, *that for the purposes of the instant proceeding vehicles which are specially designed for the transportation of iron and steel articles 30 feet or more in length should be classed as special equipment.*

* * * * * * *

The commodities listed in section I of appendix A may be considered as illustrative of articles requiring *specialized handling,* but should not be considered as all inclusive of such articles. Other iron and steel products which are similar in their transportation characteristics and iron and steel articles which are integrally a part of a shipment requiring specialized handling or special equipment may be included therewith. [Emphasis added.]

The listing referred to contains more than 100 specific iron and steel articles or classes thereof, including, as examples, such items as bars, billets, blooms, cable, castings, forgings, molds, pipe, plate, rods, shapes, stampings, and weldings, to name a few. *Specialized handling* was said to be *generally required* for:

> Any of (the) articles which are 30 feet long, or which require special rigging, or, because of the size, shape, or weight of packages, require the use of pole trailers, bulkheads, special dollies, cradles, or racks for safe transportation, or the use of cranes, derricks, or other hoisting machinery for loading, unloading, or both.

The division phrased its commodity grant to the applicant therein as follows: "Iron and steel articles which, because of shape, size, or weight, require *specialized handling rigging, or the use* of special equipment, * * *" (Emphasis added.) Thus at that time and in that case not only did the grant specifically relate to iron and steel articles, it made provision for specialized handling or rigging alternatively with the use of special equpment. It did not come squarely to grips with the issues here presented and did not decide them. It does, however, represent one of the early efforts, responsive to an established public need, to frame a grant of authority suitable to the needs of the iron and steel industry.

One of the earliest important pronouncements concerning the rights of heavy haulers was the report of division 5 on reconsideration in *Gallagher Common Carrier Application,* 48 M.C.C. 413, hereinafter called the *Gallagher* case, decided June 8, 1948. Gallagher was issued a "grandfather" certificate in accordance with the findings in the initial report therein, authorizing it to transport, among other things, commodities requiring special equipment because of size or weight. Subsequently upon petition of Gallagher the proceeding was reopened for reconsideration in order to change that commodity description to remove any question as to the holder's authority to transport various kinds of heavy

machinery which was loaded and unloaded by the use of rigging but actually was transported on flat-bed trailers. In its report the division pointed out that the commodity description in the certificate as first issued to Gallagher did not adequately describe the service intended to be rendered as *ordinary flat-bed vehicles do not come within the term "special equipment,"* (emphasis supplied) and stated at page 415:

> the framing of a commodity description so as to confine the authority to the scope of operations normally conducted by heavy haulers and riggers, as distinguished from that conducted by common carriers of general freight and which will be broad enough to authorize a complete service, without at the same time using any terms which can be lifted from their context and construed to authorize some service wholly different than obviously intended, is extremely difficult. In accomplishing herein a grant of authority to perform a complete service in the heavy hauling and rigging business, it is necessary to limit in some way the special types of commodities which can be transported and at the same time to permit the carrier to determine and use the type of vehicle best suited for transporting each shipment. The commodities to be authorized are those the transportation of which, including the loading and unloading, requires the use of special equipment even though the actual movement may be accomplished on flat-bed vehicles. In many instances the commodity will be such as to require also a special type of vehicle, such as lowboy trailers, for the transportation. * * * In the circumstances, we are of the opinion that the commodity description * * * should be revised to

read "of commodities the transportation of which, because of size or weight, requires the use of special equipment and of related machinery parts and related contractors' material and supplies, when their transportation is incidental to the transportation by applicant of commodities which by reason of size or weight require special equipment." The "transportation" referred to in this description necessarily includes loading and unloading, and a grant of authority in this form will permit the transportation of items which because of their size or weight require the use of special equipment for loading and unloading, even though the actual haul is performed on conventional flat-bed equipment.

The *Gallagher* report did not indicate whether the loading and unloading of the ordinary flat-bed equipment used in line-haul transportation was performed by the applicant. However, in *Berk Contract Carrier Application,* 62 M.C.C. 571, decided February 2, 1949, hereinafter called the *Berk* case, division 5 enlarged or clarified the doctrine of the *Gallagher* case so that a heavy hauler could use ordinary flat-bed equipment for the line-haul transportation of an authorized commodity even though the loading and unloading by the use of special equipment was actually done by the consignor or consignee or both.

Doctrine somewhat similar to that in the *Gallagher* and *Berk* cases was reiterated and enlarged upon by division 5 in 1951 in the *St. Johnsbury* case. There the division considered the scope of service of motor carriers authorized to transport commodities which, because of size or weight, require the use of special equipment and the meaning of the term "special equipment" when used

as a restriction in authorities of general-commodity carriers. The existence of a commodity "twilight zone" within which both classes of carriers might operate was also recognized. Concerning special equipment, the division said, at page 297:

> the term "special equipment" has been used in certificates to designate or describe a special type of service and as to the heavy haulers is significant in indicating the type of commodity offered and shipped by persons who require their special service. The phrase "commodities which because of size or weight require special equipment and all related machinery parts and related contractors' materials and supplies when their transportation is incidental to the transportation of commodities which, by reason of size or weight, require special equipment" enables the carrier authorized to transport such commodities to render a complete service in the particular field of transportation, but by the same token, restricts such carrier from invading the field of another type of service. Thus when used as an exception in a general commodity or other type of authority, the intent is to prevent that carrier from invading the heavy-hauler type of service. But in neither instance was it intended to prohibit the transportation of specific commodities which might rightfully fit either type of service and there naturally is an overlapping of commodities which as a practical matter move in either or both types of service. * * * The use of modern devices for the economical and expedient loading, unloading, and handling of freight should not be denied any class of carrier. The use of such equipment is not a true

and practical test of the commodities which a general-commodity carrier may or may not transport.

This does not mean that the general-commodity carriers are free to use vehicles equipped with winches and cranes and the like. Special equipment as it relates to vehicles includes winch-trucks and trailers, low-bed carry-alls, crane trucks and trailers, and any other vehicle including flat-bed vehicles, especially designed for the transportation of articles of exceptional size, shape, or weight, or which have attached as a part of the vehicle any type of mechanical loading device except the ordinary tail-gate lift, and the restriction in the authorities of general-commodity carriers against the use of special equipment relates to and includes such vehicles.

The so-called commodity tests were succinctly summarized by the Commission, division 1, in *National Automobile Transporters Assn. v. Rowe Transfer,* 64 M.C.C. 229, hereinafter called the *Rowe* case in the following language, at page 240:

> Where the commodity in question "requires" special equipment or special services for loading or unloading, or both, and *only* ordinary vehicular equipment for the over-the-road portion of the transportation, such commodity (1) is within the authority of a heavy hauler irrespective of whether or not the heavy hauler is required to provide such loading and unloading equipment or service, and (2) is within the authority of a general-commodity carrier whose authority excepts "commodities requiring special equipment" provided the loading or unloading or both which necessitates the special

equipment is performed by the consignor or consignee, or both.

Among the issues confronting division 1 in *Black—Investigation of Operations,* 64 M.C.C. 443, hereinafter called the *Black* case, was the question whether certain commodities that were bundled or palletized lawfully could be transported by heavy haulers, or by general-commodity carriers whose operating authorities excluded commodities requiring special equipment, or by both types of carriers. In the *Black* case the division, at page 446, cited with approval another case, saying:

> In *Johnson Common Carrier Application,* 61 M.C.C. 783 (791-2) cited by the Bureau, the Commission, division 5, stated:
>
> "We therefore conclude that the individual commodity or commodities to be transported, as contrasted to a shipment in the aggregate, must be within the scope of the authority granted * * * Thus the test is whether the commodity or commodities severally are such as to require the use of special equipment for loading and unloading or over-the-road transportation, or both. * * * It follows that where conventional vehicular equipment is to be used for transportation, the comondity itself, to be within the scope of "heavy hauling" authority, must be such as to require special equipment for loading and unloading."

That case dealt with palletized boxes of roller bearings weighing in the aggregate about 3,000 pounds and while no specific finding was made concerning their transportation as "articles requiring special equipment," the test as set forth above must

govern each such shipment. *With respect to the bundles of sheet metal here involved, we think bundling was required by the inherent nature of the commodity. Single sheets are unstable, subject to bending or other damage, and, having in mind their size, awkward or impossible to handle without bundling.* In the case of sheet tinplate, at least, bundling would also seem to be required as protection against damage to the coated surface of the sheets, and the same is true, to a lesser extent, with respect to the rather soft aluminum sheets. Examination of the facts concerning this method of handling convinces us that *the bundling is done not merely for economy and efficiency but because it is required by the inherent nature of the commodity.* When bundled the commodities are too heavy to handle without the use of special equipment, and we therefore conclude that these four shipments were within respondent's authority to transport "articles requiring special equipment." This is not to imply that these commodities may not be transported also by the general-commodity carrier whose operating authority excepts commodities requiring the use of special equipment if the test enunciated in *National Automobile Transporters Assn. v. Rowe Transfer,* 64 M.C.C. 229, decided July 28, 1955, is met. [Italics added.]

In concluding that certain aggregated commodities did not fall within the very limited exception to the *Johnson* case rule, it was stated further, at page 447:

Clearly, aggregation of palletization, though a convenience and from a pratical standpoint desirable prior to transportation, *was not dictated or re-*

> *quired by the inherent nature of the commodity itself nor so essential or imperative as to the aggregation or the palletized lot "the commodity itself"* rather than in fact an aggregation. Looking through the aggregation, *"the commodity itself"* did not require the use of special equipment. [Italics added.]

The foregoing is no more than a limited application of a longstanding principle that in the construction of heavy-hauler authority the commodity itself is the controlling consideration and not the act of palletizing, the method of packaging, or the type of container in which the commodity is shipped.

Thus, only under unusual circumstances may aggregation or bundling result in a situation where such commodities may thereby be recognized as requiring special equipment. This is a special exception to the long-recognized general rule which looks at "the commodity itself"; it is in no sense applicable where bundling is done on the basis of economy and efficiency; the mere act of the shipper in tendering a particular sized bundle or palletized shipment is not controlling; and we wish to emphasize the obvious necessity for maintaining such exception within its strictest limits. Otherwise, there would hardly be any end to which the practice of aggregation might permit the heavy hauler to invade the general-commodity field, contrary to the public interest and contrary to the clear purport of its operating authority. It should be made clear, also, that in those few instances where it is essential that items be bundled by their "inherent nature" for protection or otherwise, that the minimum such bundle which is required for such

protection is the size or type of bundle which must be used to make the determination whether any necessity exists for the use of special equipment.

Somewhat akin to the foregoing bundling rule and again emphasizing the narrow field of its application is the stress placed on the individual unit test in *Hove Truck Line v. Eldon Miller, Inc.*, 63 M.C.C. 753, wherein division 5 stated at page 756:

> The fact that mechanical hoisting devices are convenient in piling the individual units high enough to obtain a maximum load is immaterial, since we are concerned only with the individual units in making a determination as to whether special equipment is required.

The foregoing discussion, while representing a review of the leading precedents generally controlling the issues here involved, still only covers a few facets of the overall heavy-hauling problem. In making limited determinations we must not lose sight of the larger background and purpose of that industry generally. As stated in the early part of this discussion, it must be remembered that heavy-hauling service has been recognized for over two decades of Federal regulation of motor carriers as being a highly specialized type of service performed by a distinct class of carriers who hold themselves out to transport any article which because of its size, shape, or weight requires some special device for loading and unloading and generally the use of special equipment for the intervening line-haul movement.

In the light of what has been said we again direct our attention to the three major issues previously set forth. Concerning the question of special equipment, we

are convinced that flat-bed vehicles of usual and ordinary design, even though of a reinforced or heavy duty type, should not be found to be special equipment. Even the addition of headerboards or other protections which may be desirable to protect the driver or which are required by our safety regulations in no way changes the basic design of the equipment and thus do not make it special. We are not here dealing with pole trailers, lowboys, goosenecks, winch-equipped trailers, or trailers of odd and unusual design and appearance which we have never hesitated to recognize as special equipment. The vehicles here involved though of a heavy-duty type are, nevertheless, ordinary in design and ordinary in their usage. Ordinary flat-bed vehicles were discused in the *Steel Transportation,* the *Gallagher,* and the *St. Johnsbury* cases. The overall conception of special equipment as explained in those cases is not generally out of accord with what we have said here, but to the extent that these and other cases contain implications to the contrary, we think the proper construction is and should be as clarified here. By the same token that we have permitted heavy haulers to take advantage of modern shipper loading devices and thereby perform their services with ordinary vehicular equipment, and without furnishnig special loading or unloading equipment—we have recognized and must continue to recognize progress and modern trends in the general-commodity carriers' operations and in their use of modern heavy-duty trailers so long as they remain of ordinary flat-bed design.

It, nevertheless, is argued by Dillner that its equipment is specially constructed to support a concentrated weight of 1,000 pounds per square foot or more, and

that trailers of this type represent a reasonable line of demarcation as between ordinary flat-bed equipment and special equipment. The evidence of record does not indicate that this is special equipment, nor in fact that the commodities here involved "require" trailers of this particular type. Thus, we do not here reach for determination the issue of a dividing line or the point at which a heavy-duty flat-bed trailer of ordinary dimensions, design, and appearance might by reason of unusual and extraordinary reinforcement become special equipment. This question, however, is an important one and has been pointed up recently in several cases including *Dallas & Mavis Forwarding Co., Inc., Ext.—Galion, Ohio,* 72 M.C.C. 653, hereinafter called the *Dallas & Mavis* case, in which division 1 found road rollers weighing 15,000 pounds or more to require flat-bed vehicles in the category of special equipment, because of extreme weight concentration along thin lines of the vehicle bed. In reality, however, this represented an effort to recognize that at some point, even in the case of commodities loaded under their own power[3] the spectacle of unusual size and unusual weight must ultimately bring that commodity within the authority of the conventionally authorized heavy hauler regardless of its self-loading characteristics or the type of equipment used to haul it. To clarify that point the

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[3] In *L. C. Jones Trucking Co. Extension—The Dakotas,* 62 M.C.C. 539, *Clark Transport Co. Extension—Farm Tractors,* 62 M.C.C. 555, and other cases, it has been held that automobiles, trucks, farm tractors and other commodities capable of being loaded and unloaded under their own power on ordinarily van-type or flat-bed vehicles are not commodities requiring the use of special equipment.

*Dallas & Mavis* case was reopened for further hearing, and in a report being decided by us concurrently herewith (79 M.C.C. 285) it is being made plain that in that particular case it is not the hauling equipment that is special, but that bearing in mind the nature of *heavy hauling service,* single-item shipments weighing 15,000 pounds or more, which otherwise might be beyond the scope of a heavy hauler's authority by reason of being capable of loading under their own power, must at that point, regardless of other considerations, be found within such authority, if not otherwise precluded by specific commodity limitations in the carrier's certificate. This does not fix 15,000 pounds as the sole criterion to establish whether a commodity falls within the scope of heavy hauling authority, but rather it is a last-resort test to which refuge may be taken when after applying all the usual tests, the authority or not of a heavy hauler to transport a single-unit item still remains uncertain. In other words, when the usual tests already discussed fail to point with assurance to the answer to the question as to a heavy hauler's authority to transport a single-unit item then the doubt may be resolved by the last-resort weight test above indicated, and if the item weighs 15,000 pounds or more it may be found to be within the description "commodities, the transportation of which because of size or weight requires the use of special equipment" or other similar phrased authorities. This should clarify one of the heretofore difficult questions concerning heavy haulers, should not disturb the rights of general-commodity carriers as to such commodities if they can otherwise qualify, and should prevent a strained interpretation with respect to flat-bed trailers in attempt-

ing to accomplish the same ultimate and compelling result.

As far as the issues here are concerned, the commodities to which the evidence of record relates have been and are transported, as tendered by the shippers, on flat-bed trucks, flat-bed full trailers, and flat-bed semitrailers of the size, construction, weight, and equipment commonly used for the transportation of general commodities including lumber and its products, building materials, and numerous other commodities which do not require the use of closed vans. These vehicles are not equipped with winches or other devices for loading or unloading. A representative of a trailer manufacturer, who was presented as a witness by Dillner, referred to the flat-bed trailer used by Dillner as heavy-duty trailers made for handling heavy commodities such as steel which imposes a concentrated load on the trailer floor. However, the floors are not, and need not be, of any essentially different construction or load-carrying capacity from those of the vehicles which are customarily used by general-commodity carriers for transporting a wide variety of commodities. Many of the steel articles to which the evidence relates have been and are transported in ordinary open-top and closed vans. The evidence as a whole leads to the previously indicated conclusion that the vehicles used by Dillner, Lake Shore, and other motor carriers for the transportation of the iron and steel articles and fiberbrick, to which the evidence relates and which have been described in some detail in this report, fall within the class of vehicles commonly known to the industry as ordinary flat-bed vehicles and that these vehicles are not special equipment.

Moving next to the question of aggregated or bundled commodities, as heretofore noted, the line of decisions on this question are essentially uniform and clear. Despite the fact that in the *Black* case an exception was made as to certain unstable and easily damaged sheets of metal which were required to be bundled for protection by the inherent nature of the article so that the bundle actually constituted the commodity itself, the rule is still valid and the exception has a very narrow application. For the reasons previously stated, in applying the exception we must consider the minimum-sized bundle that will afford the required protection as the bundle to be tested for size or weight in determining whether it is within the authority of the heavy hauler.

By the same token the general commodity carrier may only handle this latter type bundle when loaded and unloaded, by the consignor, or consignee, or both in accordance with the doctrine of the *Rowe* case.

Other type bundles aggregated for economy, efficiency, or otherwise obviously may be transported by the general-commodity carrier on ordinary equipment if no special equipment is furnished by the carrier for loading or unloading.

With the foregoing concepts in mind we have little difficulty in adopting a good many of the ultimate conclusions of the examiner. As stated in his report, some pieces of structural steel are of such size and weight as to require the use of the low-bed carryalls or other special types of vehicles for over-the-road transportation, as well as mechanical devices for loading and unloading. That Dillner may lawfully transport such

pieces of structural steel within the territory specified in its certificate is not here questioned. The record contains no evidence that Lake Shore has transported any such pieces of structural steel.

As set forth in detail at the beginning of this report the examiner divided the commodities to which the evidence relates into two groups. Group 1 consists of named commodities each individual piece of which is of such weight that it cannot be loaded manually, but requires a crane or other special device for loading. Group 2 consists mostly of the same commodities and a few others, each individual piece of which is not in excess of the weight and size that can be loaded and unloaded manually, without the use of a crane or other special device, but which are tendered to the carrier in bundles or packages, or fastened on skids, in such quantity and of such aggregate weight that a crane or other special device is necessary to load the bundles, packages, and skids.

As transported by Dillner, Lake Shore, and the intervening motor carriers, all of the commodities, in both groups, are loaded with cranes, Hyster trucks, or other special devices furnished and operated by and at the expense and risk of the shippers. These commodities are also unloaded with such special equipment furnished and operated by and at the expense and risk of the receivers in all instances when shipments thereof are transported by Dillner, and in most instances when shipments thereof are transported by Lake Shore and other motor carriers. Sometimes these carriers unload commodities in the first group manually, or by use of rollers, or by pulling off their vehicles. It is not

uncommon for small receivers served by Lake Shore and carriers other than Dillner to cut the fastenings on the bundles or packages of commodities in the second group and unload then manually.

In accordance with the criteria which have been discussed, the evidence herein indicates that the transportation of the commodities in group 1 (which were loaded and unloaded by the shipper or consignee) by both Dillner and Lake Shore has been and is authorized by their certificates and is lawful; that the transportation by Dillner of those commodities in group 2 consisting of steel sheets and steel plates, where bundling in the size contemplated by group 2 is required by the inherent nature of the commodity has been and is authorized by its certificates and is lawful; that the transportation of all of the commodities in group 2 which were loaded and unloaded by the shipper or consignee by Lake Shore has been and is authorized by its certificate and is lawful; and that the transportation by Dillner of commodities in group 2 consisting of steel channels, plates, sheets, bars, rods, pipe, coils, rolling-mill rolls, not required by the inherent nature of the commodity to be bundled in the size contemplated by group 2, and of firebrick, is not authorized by its certificate and is unlawful. Unlike borderline situations which might arise in certain of the other commodities, the inherent nature of firebrick is not such that they are required to be palletized. Neither custom, usage, nor modern loading and shipping practices have established this commodity in the heavy-hauling category, and although we recognize that the heavy haulers should retain their customary traffic despite modern shipper practices which result in such heavy haulers' perform-

ing nothing more than bare over-the-road transportation with ordinary flat-bed equipment, we must be alert to keep them reasonably within their recognized sphere unless and until they have established the right to depart therefrom on the basis of authority acquired therefor on a showing of a public need as required by part II of the act.

Except to the limited extent indicated above, we agree with the conclusions of the examiner, including those relating to the special service charge in the tariff of Lake Shore. Its certificate does not authorize the transportation of commodities requiring special equipment for loading or unloading unless the loading or unloading is performed by the shipper, or receiver, or both. The provision of its tariff naming a charge of 5½ cents per 100 pounds for such service is unlawful and should be canceled.

In view of the rather extended nature of the foregoing discussion, a brief summary of the more important major principles of construction being followed or clarified are set forth below:

(1) Reinforced or heavy-duty flat-bed vehicle of usual and ordinary design, with or without header boards, or other protections required by our safety regulations, are not special equipment as that term is used in the operating authorities here under consideration;

(2) The so-called twilight zone approach as it relates to the construction of operating authorities of heavy haulers and general-commodity carriers, as summarized in the *Rowe* case, 64 M.C.C. 229, is well established, reasonable in its application, and will continue to be recognized;

(3) In bundling, aggregating, or palletizing, it should be the general rule of construction (1) that the individual "commodity itself" is the controlling consideration as respects a carrier's authority; (2) that the limited exception which the *Black* case, 64 M.C.C. 443, represents, where commodities are bundled for protection or as otherwise required by their "inherent nature," must be maintained within its strictest limits; (3) that the minimum bundle which is required by the "inherent nature" of the commodity is the size or type of bundle which must be considered in any determination whether necessity exists for the use of special equipment; and (4) that in order reasonably to maintain these limits it shall be presumed, in the absence of a sound basis for concluding to the contrary, that commodities tendered to carrier, in bundles or aggregations, are within the general rule and not within the limited exception thereto;

(4) Heavy haulers, insofar as bundled or aggregated commodities are concerned, may transport only those which fall within the narrowly excepted group as described in (3) next above;

(5) The usual type general-commodity carrier may transport bundled commodities within the excepted group set forth in (3) above *only* when loaded or unloaded by the consignor or consignee in accordance with the doctrine of the *Rowe* case, but the general-commodity carrier may transport other types of bundled or aggregated commodities so long as they are transported on ordinary equipment; and

(6) Recognition is given to the principle enunciated in the concurrently decided *Dallas & Mavis case* (79 M.C.C. 285) that as a last-resort test, single-item shipments weighing 15,000 pounds or more even when loaded and unloaded under their own power and transported on ordinary equipment are within the authority of the unlimited heavy hauler, but are not for this reason necessarily without the authority of the general-commodity hauler.

Allegations, contentions, and arguments which are not sustained or otherwise expressly disposed of in these conclusions and the following findings are found not justified.

## FINDINGS

In No. MC-C-1766, we find that respondent, W. J. Dillner Transfer Company, has engaged and is presently engaged in the transportation in interstate or foreign commerce, of steel channels, plates, sheets, bars, rods, pipe, coils, rolling-mill rolls, and firebrick, in bundles or packages, or fastened on skids; that such commodities are not required by their inherent nature to be aggregated in quantities of such size and weight that they are incapable of being loaded and unloaded manually; and that such commodities are not commodities which because of their weight or size require special equipment either for loading or unloading or for line-haul transportation, or both; that such transportation by this respondent is not authorized by its certificates of public convenience and necessity; that such transportation has been and is a violation of section 206(a) of the Interstate Commerce Act and that an order should be entered requiring respondent to cease and desist from the performance of these unauthorized operations.

In the cross complaint filed under No. MC-C-1708, we find that cross defendant, Lake Shore Motor Transfer Company, has published in its tariff a provision that a charge of 5.5 cents per 100 pounds will be made for the loading and unloading of heavy and bulky articles requiring special devices for safe loading and unloading, when such loading and unloading service is performed by that carrier; that such provision is unlawful for the reason that the carrier has no authority to perform such service; and that an order should be entered requiring that such provision be canceled.

In No. MC-C-1767, we find that the issues are either moot because of our decision in No. MC-C-1510, *Iron and Steel Articles—Eastern Common Carriers,* 68 M.C.C. 717 and 305 I.C.C. 369, or the allegations of complainants are not supported by the evidence, and that this complaint should be dismissed.

An appropriate order will be entered in accordance with the above findings, which order also will dismiss the complaint in No. MC-C-1708 in accordance with the request of the complainants therein, as well as the cross complaints against Long Transportation Company and Lattavo Brothers, Inc., in accordance with the request of the cross-complainant therein.

COMMISSIONER FREAS, concurring in the result:

I concur in the report of the majority except to the extent that it reaffirms the 15,000-pound so-called last resort test. My reasons for not subscribing thereto are set forth in my separate expression in the *Dallas & Mavis case* (79 M.C.C. 285, 299), wherein this test has been established.

COMMISSIONER WALRATH, concurring in part:

I agree with the report except to the extent it holds that the transportation of palletized firebrick is beyond the scope of heavy-hauling authority. The factual findings in the body of the report would seem to lay the basis for another result, pointing up as they do the fragility and need for careful handling of firebrick in order that it will be acceptable to the consignee. In my opinion, the circumstances surrounding such transportation are so similar to those attendant upon the transportation of sheet steel, found here to require bundling and thus, in minimum packages, to be in the "twilight zone," as to require the same result.

COMMISSIONER ARPAIA, dissenting in part:

I conceive it to be the duty of this Comission, in making an administrative determination of the scope of operating authorities, to so frame its interpretation that shippers and carriers alike will know where they stand and will not be drawn into unwitting violations. Such a determination should be clear and intelligible primarily to the average layman, to the shippers and to carrier employees.

It seems to me that under the tests laid down in this decision, it will take a "Philadelphia lawyer" to determine when a commodity, particularly one in the "twilight" zone, is within the scope of the authority of a general commodity carrier or within that of a heavy hauler.

All any carrier sells is *service;* and the nature of that service should be the influencing factor in defining the scope of operating authorities. The simple test

should be: does the *carrier* itself furnish special equipment at any stage of its service either loading, unloading, or in the over-the-road transportation of the traffic which in turn *requires* such special equipment?

Since the beginning of regulation the problem of interpreting operating authorities has been a baffling and confusing one. It has been particularly troublesome in the determination of which traffic comes within the scope of the so-called heavy haulers' authority. Judging from the many issues raised herein, the carriers and shippers still do not know where they stand. This is because, after numerous cases and some twenty-four years of regualting motor transportation, we still have failed to establish a definitive standard capable of being applied by the carriers in their day-to-day operations.

The instant report in no way provides such a guide. Rather, it will, in my opinion, perpetuate interminable interpretative problems and cause continuing litigation and expense.

As I see it, the source of the difficulty is that we have attacked the problem in an overlegalistic and theoretical manner rather than in a practical fashion. Principally because we have generally described grants of authority in terms of the commodities authorized to be transported, we have interpreted heavy haulers' authorities by reference to the commodity decription but have virtually overlooked the distinguishing feature traditionally associated with bona fide heavy haulers; that is, the *special* type of service which historically has been an integral part of heavy hauling. Our failure to properly consider this factor has led us to the present interpretative morass.

*Appendix "B"—Report of the Commission.*

Historically, a heavy hauler provided a service which was unobtainable from carriers performing the usual type of transportation service. Whether by using special equipment in loading or unloading or by utilizing a special type of road equipment, the heavy hauler fulfilled a need for a service not otherwise available. The distinguishing characteristic which set him apart from other types of motor carriers was a specialized *service*. That, in my opinion, is the factor which should be determinative as to whether a particular operation falls within the scope of a heavy hauler's authority.

Admittedly, it may be considered late in the game to adopt the "type-of-service" theory as a means of interpreting these authorities. However, we would do well to meet the issue squarely now rather than to compound the errors of the past. Otherwise, twenty or thirty years from now the question will be asked: "Why wasn't a sounder rule established back in 1959?"

The instant report affirms the *Rowe* decision, 64 M.C.C. 229, which holds that a heavy hauler may transport a commodity requiring special equipment or special services for loading or unloading, or both, even though the carrier itself provides no loading or unloading equipment and utilizes only ordinary equipment for the over-the-road portion of the transportation. How such a service comes within the definition of true heavy haulage I am unable to comprehend.

The "inherent nature" test as laid down in the *Black* decision, 64 M.C.C. 443, is equally vague, unrealistic, and difficult to apply. Such a test serves to confuse the industry and the shippers.

The 15,000-pound "last-resort" test to govern certain commodities constitutes an implied admission that, despite the multiplicity of other tests which have been devised to interpret heavy haulers' authority, such tests, singly or collectively, fail to provide a complete solution. Incidentally, there is no subordinate reasoning or other justification for fixing a 15,000-pound demarcation line.

I think that the Commission, in the interest of sound regulation and for the benefit of shippers and carriers, should take a fresh look at this vexing problem and fix a simple standard. The "type-of-service" test offers a means of extricating ourselves—and the industry—from the labyrinth into which our prior decisions have lead us.

COMMISSIONERS MITCHELL and WEBB did not participate.

## APPENDIX "C"

### Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of February, A. D. 1955.

NO. MC-C-1766

W. J. DILLNER TRANSFER COMPANY

INVESTIGATION OF OPERATIONS

*It appearing,* That in Docket No. MC-21623 and subnumbers, W. J. Dillner Transfer Company, of Pittsburgh, Pa., was issued certificates of public convenience and necessity by this Commission authorizing the transportation over irregular routes of the commodities specified therein, including commodities which because of their weight or size require special equipment, from or to or between points and places specified therein;

*And it further appearing,* That the said W. J. Dillner Transfer Company has filed a petition, dated September 15, 1954, for a declaratory judgment clarifying its authority to transport heavy commodities in interstate commerce, and that Detroit-Pittsburgh Motor Freight, Inc., and other interested persons have filed a petition, dated August 25, 1954, in which they allege that the said W. J. Dillner Transfer Company has been and is engaged in transporting commodities not within the scope of its operating authority and in which they seek an investigation under sections 204(c) and 212(a) of the Interstate Commerce Act of the practices and operations of said company;

And good cause appearing therefor;

*It is ordered,* That an investigation be and it is hereby instituted under authority of section 204(c) of the Interstate Commerce Act for the purpose of determining (1) whether the said W. J. Dillner Transfer Company may lawfully transport structural steel and shipments of other commodities from and to points specified in the certificates held by it which are in packages or pieces which because of size or weight require mechanical power to load or unload, or which require special vehicles including specially equipped flat-beds for their transportation and (2) whether the said W. J. Dillner Transfer Company has been and is engaged in transporting other commoditis not within the scope of its operating authority, in violation of section 206(a) of said Act or of any requirement, restriction, term, or condition of said certificates, with the view to making determination of these issues, entering such order, or orders, if any, and taking such other action, as the facts and circumstances may appear to warrant;

*It is further ordered,* That the said W. J. Dillner Transfer Company be made the respondent in this proceeding, that a copy of this order be served upon it, and upon all parties to petitions for leave to intervene in the proceedings sought in the petition of the said W. J. Dillner Transfer Company for a declaratory judgment, and that notice of this proceeding be given to the public by posting a copy of this order in the office of the Secretary of the Commission, Washington, D. C.;

*It is further ordered,* That the petition of W. J. Dillner Transfer Company for a declaratory order, the petition of Detroit-Pittsburgh Motor Freight, Inc., for a revocation proceeding, and the motion of W. J. Dillner

Transfer Company to dismiss the petition filed by Detroit-Pittsburgh Motor Freight, Inc. (to the extent they are not herein granted) be and they are hereby denied, and that Eclipse Motor Lines, Inc., Detroit-Pittsburgh Motor Freight, Inc., and other parties to petitions for leave to intervene in the proceedings sought in the petition filed by the said W. J. Dillner Transfer Company for a declaratory judgment be, and they are hereby, granted leave to intervene in this proceeding;

*It is further ordered,* That all intervenors shall inform the respondent in writing, not less than 15 days prior to the hearing, of the facts as to which evidence will be adduced at the hearing, and of their position regarding the legality of such matters, furnishing 3 copies of such written notices to the Commission. Persons desiring notice of any hearing schedule in the proceedings should promptly so inform the Commission, in writing.

*And it is further ordered,* That this proceeding be assigned for hearing at such time and place as may hereafter be specified.

By the Commission.

GEORGE W. LAIRD
Secretary

(SEAL)

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NOTE

Two orders were issued by the Commission on February 7, 1955. The other was in short form and dealt with a petition filed by Hess Cartage Co.

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## APPENDIX "D"

### Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of September, A. D. 1959.

No. MC-C-1766

W. J. DILLNER TRANSFER COMPANY INVESTIGATION OF OPERATIONS ET AL.

*It appearing,* That the report and order in the above-entitled proceedings, decided April 10, 1959, contains (1) "Lake Shore Motor Transfer Company" (a) on line 3 and 4 of footnote 1, on line 4 of sheet 3, and on line 32 of sheet 40 of the said report and (b) on lines 2 and 3 of the second ordering paragraph of the said order, and (2) "pipe" on line 17 of sheet 40 of said report;

*It further appearing,* That the quoted matter in the first appearing paragraph hereof is not supported by the evidence of record; and good cause appearing therefor:

*It is ordered,* That "Lake Shore Motor Transfer Company" be and it is hereby, stricken (a) from lines 3 and 4 of footnote 1, line 4 of sheet 3, and line 32 of sheet 40 of the said report, and (b) from lines 2 and 3 of the second ordering paragraph of the said order, and "Lake Shore Motor Freight Company" substituted in lieu thereof;

*It is further ordered,* That "pipe," be, and it is hereby, stricken from line 17 of sheet 40 of said report;

Upon consideration of the records in the above-entitled proceedings, and of:

(1) Petition, dated May 12, 1959, of W. J. Dillner Transfer Company, respondent in No. MC-C-1766 and complainant in No. MC-C-1708, for reconsideration;

(2) Petition, dated June 2, 1959, of Heavy-Specialized Carriers Conference, intervener in No. MC-C-1766, for reconsideration;

(3) Tendered petition, dated May 15, 1959, of Ace-Doran Hauling & Rigging Company for reconsideration in No. MC-C-1766;

(4) Petition, dated May 8, 1959, fo E. J. Lavino and Company for leave to intervene in No. MC-C-1766, embracing tendered petition for further hearing and for reconsideration;

(5) Petition, dated June 9, 1959, of Union Carbide Metals Company, for leave to intervene in No. MC-C-1766, embracing tendered petition for reconsideration;

(6) Petition (letter), dated June 9, 1959, of Union Carbide Metals Company, for waiver of Rule 1.101(e) of the General Rules of Practice in No. MC-C-1766;

(7) Tendered petition, dated June 23, 1959, of Union Carbide Metals Company, for reconsideration in No. MC-C-1766;

(8) Petition, dated May 22, 1959, of United States Steel Corporation, for leave to intervene in No. MC-C-1766;

(9) Tendered petition, dated May 22, 1959, of United States Steel Corporation in No. MC-C-1766, for further hearing;

(10) Petition, dated May 18, 1959, of Home Transportation Company, Inc., for leave to intervene in No. MC-C-1766, and for stay of the order of the Commission in No. MC-C-1766;

(11) Joint petition, dated June 11, 1959, of National Automobile Transporters Association, Arco Auto Carriers, Commercial Carriers, Inc., Convoy Company, Dealers Transit, Inc., Fleet Carrier Corporation, Fugate and Girton Driveaway Company, Kenosha Auto Transport Corporation, Howard Sober, Inc., and Truckaway Corporation, for leave to intervene in No. MC-C-1766 embracing a petition for waiver of Rule 1.101(e) of the General Rules of Practice and a tendered petition for reconsideration;

(12) Motion, dated July 1, 1959, of the Regular Common Carrier Conference of the American Trucking Associations, Inc., intervener, to strike petition in (7) above;

(13) Motion, filed June 5, 1959, of the Regular Common Carrier Conference of the American Trucking Associations, Inc., intervener, to strike petition in (3) above, and in the alternative, reply to said petition;

(14) Joint reply, dated June 19, 1959, by B. & P. Motor Express, Inc., Continental Transportation Lines, Inc., Deioma Trucking Company, Eastern Freight Line Inc., Eazor Express, Inc.,

Helm's Express, Inc., Keystone-Lawrence Transfer & Storage Co., Leonard Bros., Motor Express Service, Inc., North Braddock Motor Lines Co., and Standard Motor Freight Co., interveners, to petition in (1) above;

(15) Reply, filed June 23, 1959, by the Eastern Territory Railroads, intervener, to petition in (1) above;

(16) Reply, filed May 29, 1959, by the Regular Common Carrier Conference of the American Trucking Associations, Inc., intervener, to petition in (1) above;

(17) Reply, dated June 23, 1959, by the Regular Common Carrier Conference of the American Trucking Associations, Inc., intervener, to petition in (2);

(18) Reply, filed June 23, 1959, by the Eastern Territory Rairoads, intervener, to petition in (2) above;

(19) Reply, filed June 23, 1959, by the Eastern Territory Railroads, intervener, to petition in (3) above;

(20) Reply, filed May 28, 1959, by the Eastern Territory Railroads, intervener, to petition in (4) above;

(21) Joint reply, dated May 26, 1959, by B. & P. Motor Express, Inc., Continental Transportation Lines, Inc., Deioma Trucking Company, Eastern Freight Line Inc., Eazor Express, Inc., Helm's Express, Inc., Keystone-Lawrence Transfer & Stor-

age Co., Leonard Bros., Motor Express Service, Inc., North Braddock Motor Lines Co., and Standard Motor Freight Co., interveners, to petition in (4) above;

(22) Reply, filed June 23, 1959, by the Eastern Territory Railroads, intervener, to the petition in (8) above;

(23) Reply, filed June 23, 1959, by the Eastern Territory Railroads, intervener, to the petition in (9) above;

(24) Reply, filed June 23, 1959; by the Regular Common Carrier Conference of the American Trucking Associations, Inc., intervener, to petition in (4) above;

(25) Joint reply, dated June 19, 1959, by B. & P. Motor Express, Inc., Continental Transportation Lines, Inc., Deioma Trucking Company, Eastern Freight Line Inc., Eazor Express, Inc., Helm's Express, Inc., Keystone-Lawrence Transfer & Storage Co., Leonard Bros., Motor Express Service, Inc., North Braddock Motor Lines Co., and Standard Motor Freight Co., interverners, to petitions in (8) and (9) above;

(26) Reply, filed June 4, 1959, by the Regular Common Carrier Conference of the American Trucking Associations, Inc., intervener, to petitions in (8) and (9) above;

(27) Reply, filed June 23, 1959, by the Eastern Territory Railroads, intervener, to petition in (10) above;

(28) Reply, filed June 4, 1959, by the Regular Common Carrier Conference of the American Trucking Associations, Inc. intervener, to petition in (10) above;

(29) Joint reply, filed June 23, 1959, by B. & P. Motor Express Inc., Continental Transportation Lines, Inc., Deioma Trucking Company, Eastern Freight Line Inc., Eazor Express, Inc., Helm's Express, Inc., Keystone-Lawrence Transfer & Storage Co., Leonard Bros., Motor Express Service, Inc., North Braddock Motor Lines Co., and Standard Motor Freight Co., interveners, to petitions in (2), (3), and (10) above;

and good cause appearing therefor:

*It is further ordered,* That the motions in (12) and (13) above be, and they are hereby, overruled for the reason that the pleadings complained of are in sufficient compliance with the General Rules of Practice and are entitled to consideration on their merits;

*It is further ordered,* That Ace-Doran Hauling & Rigging Company, E. J. Lavino and Company, Union Carbide Metals Company, National Automobile Transporters Association, Arco Auto Carriers, Commercial Carriers, Inc., Convoy Company, Dealers Transit, Inc., Fleet Carrier Corporation, Fugate & Girton Driveaway Company, Kenosha Auto Transport Corporation, Howard Sober Inc., United States Steel Corporation, Home Transportation Company, Inc., and Truckaway Corporation be, and they are hereby, permitted to intervene in No. MC-C-1766 with the right to appear and participate in all further proceedings therein;

*It is further ordered,* That Rule 1.101(e) of the General Rules of Practice be, and is hereby, waived, and the tendered petitions in (3), (4), (5), (7), (9), and (11), be, and they are hereby, accepted for filing;

*It is further ordered,* That in all other respects the petitions in (1), (2), (3), (4), (5), (7), (9), (10), and (11) be, and they are hereby, denied, for the reason that with the modification of the said report and order of April 10, 1959, by this order, the findings of the Commission on oral argument are in accordance with the evidence and the applicable law, and that no sufficient cause appears (a) for reopening the proceedings for reconsideration and/or for further hearing or (b) for staying the effective date of the said order of April 10, 1959, so far as it pertains to No. MC-C-1766, beyond the date fixed in the next ordering paragraph hereof;

*And it is further ordered,* That the order of April 10, 1959, as subsequently modified with respect to the compliance date, and later indefinitely postponed, be, and it is hereby, reinstated and the compliance date by W. J. Dillner Transfer Company in No. MC-1766 and by Lake Shore Motor Freight Company in No. MC-C-1708 is fixed as November 20, 1959.

By the Commission.

HAROLD D. McCOY
Secretary

[SEAL.]

## APPENDIX "E"

### Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of January, A. D. 1960.

No. MC-C-1766

W. J. DILLNER TRANSFER COMPANY INVESTIGATION OF OPERATIONS ET AL.

* * * * * * *

Upon consideration of the records in the above-entitled proceedings, and of:

(1) Joint petition, dated October 28, 1959, of W. J. Dillner Transfer Company, respondent in No. MC-C-1766, and cross-complainant in No. MC-C-1708, and Ace-Doran Hauling & Rigging Company, intervener, for reconsideration and vacation of the order entered in those proceedings on September 23, 1959.

(2) Reply, filed November 3, 1959, by Regular Common Carrier Conference of America Trucking Association Inc., intervener.

(3) Joint reply, dated November 13, 1959, by B & P Motor Express, Inc., Continental Transportation Lines, Inc., Deioma Trucking Company, Eastern Freight Lines, Inc., Eazor Express, Inc., Helm's Express, Inc., Keystone-Lawrence Transport & Storage Co., Leonard Bros. Motor Exprers Service, Inc., North Braddock Motor Lines Co., and Standard Motor Freight Co., interveners.

(4) Joint reply, filed November 16, 1959, by Detroit-Pittsburgh Motor Freight, Inc., Wenham Transportation, Inc., Sentle Trucking Corporation, the Glenn Cartage Company, interveners, Lake Shore Motor Freight Company, cross-defendant in No. MC-C-1708, and the following carriers, not parties of record, Daniels Motor Freight, Inc., Coraopolis Transfer and Storage Company, Daniels Transfer Company, and McGaughey Bros., Inc.

(5) Reply, filed November 17, 1959, by Eastern Territory Railroads, interveners.

(6) Motion, filed November 17, 1959, by Eastern Territory Railroads, interveners, to strike petition in (1) above.

and good cause appearing therefor:

*It is ordered,* That the reply in (4) above in sofar as it is on behalf of Daniels Motor Freight, Inc., Coraopolis Transfer and Storage Company, Daniels Transfer Company, and McGaughey Bros. Inc., be, and it is hereby, rejected because they are not parties of record;

*It is further ordered,* That the motion in (6) above be, and it is hereby, overruled for the reason that the petition in (1) above is in sufficient compliance with the General Rules of Practice and is entitled to consideration on its merits:

*It is further ordered,* That the petition in (1) above be, and it is hereby, denied for the reasons (a) that the order of September 23, 1959, among other things, properly denied petitioners' prior petitions for reconsideration after it appeared that the findings of the Commission on oral argument in its report of April 10, 1959,

as modified by said order of September 23, 1959, were in accordance with the evidence and the applicable law, (b) that the said order of September 23, 1959, is legally sufficient and meets the requirements of the Administrative Procedure Act, and (c) no sufficient cause appears for reopening the proceedings for reconsideration or for vacating the order of September 23, 1959;

*It is further ordered,* That the order of April 10, 1959, as subsequently modified with respect to compliance date, be, and it is hereby, reinstated, and the compliance date by Lake Shore Motor Freight Company in MC-C-1708 and by W. J. Dillner Transfer Company in No. MC-C-1766, be, and it is hereby fixed as February 29, 1960.

By the Commission.

HAROLD D. McCOY,
Secretary.

[SEAL]

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IN THE

# Supreme Court of the United States

October Term, 1961

No. 188

W. J. DILLNER TRANSFER COMPANY, et al.,
*Appellants,*

*v.*

UNITED STATES OF AMERICA, et al.,
*Appellees.*

On Appeal From the United States District Court for the Western District of Pennsylvania

## MOTION TO AFFIRM

DONALD A. BRINKWORTH,
CARL HELMETAG, JR.,
*Counsel for The Pennsylvania Railroad Company, Intervening Appellee.*

1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Pennsylvania.

July 27, 1961.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No.

W. J. DILLNER TRANSFER COMPANY, ET AL.,
*Appellants,*

*v.*

UNITED STATES OF AMERICA, ET AL.,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, The Pennsylvania Railroad Company, an intervening appellee, moves that the judgment of the District Court be affirmed on the ground that the question raised by appellants are so unsubstantial as not to warrant further argument.

## STATEMENT OF THE CASE

This is a direct appeal from a judgment of a statutory three-judge District Court, entered April 26, 1961, pursuant to 49 U. S. C. § 17(9) and 28 U. S. C. §§ 2321-25, refusing to enjoin, annul or set aside orders of the Interstate Commerce

Commission entered April 10 and September 23, 1959, and January 13, August 1 and 16, 1960, implementing the findings of its report in *W. J. Dillner Transfer Company—Investigation of Operations*, 79 M. C. C. 335 (1959). The opinion of the Court below is reported in *W. J. Dillner Transfer Company v. I. C. C.*, 193 F. Supp. 823 (W. D. Pa. 1961).

The proceeding from which the instant appeal arises was an investigation by the Commission under Section 204(c) of the Interstate Commerce Act, 49 U. S. C. 304(c), to determine whether or not the W. J. Dillner Transfer Company was transporting commodities which were not within the scope of its interstate certificates of public convenience and necessity. After four days of hearings, briefs, an Examiner's recommended report, exceptions and oral argument, the Commission concluded that Dillner was not authorized to transport steel channels, plates, sheets, bars, rods, coils, rolling mill rolls and firebrick in bundles or packages, or fastened on skids. Thereafter a cease and desist order was issued against Dillner. After several petitions for reconsideration were denied by the Commission, Dillner filed a complaint in the United States District Court for the Western District of Pennsylvania asking that the order of the Commission be enjoined, annulled and set aside. The District Court concluded that the Commission's order was supported by substantial evidence and therefore on April 26, 1961 directed that the complaint be dismissed.

By direct appeal, pursuant to 28 U. S. C., § 1253, Dillner and the other appellant motor carriers ask this Court to note probable jurisdiction and assign the matter for oral argument. In this motion The Pennsylvania Railroad Company takes the position that the questions presented by the appeal are unsubstantial within the meaning of paragraph 1(c) of Rule 16, and that, therefore, further argument is not needed. Since the opinion and order of the court below are fully consistent with the law, the Railroad moves this Court to affirm them upon the pleadings.

## ARGUMENT IN SUPPORT OF MOTION

Dillner, and the other appellant motor carriers, are known as heavy haulers. This group of carriers is generally engaged in the transportation of large machinery and other heavy commodities which, because of their size and weight, cannot be transported upon the trailers used by motor carriers handling ordinary shipments. To accommodate this large and heavy freight specially designed trailers must be used in most instances and special devices such as cranes must be used to load and unload the freight. This specially designed equipment cannot economically be used for ordinary freight with the result that heavy hauling is a specialized field.

To the group of specialists engaged in heavy hauling operations the Commission has issued certificates which do not specifically name the exact items authorized to be transported. For such certificates to do so would be impractical, if not impossible, because heavy machinery and like commodities include an extremely wide range of individual items. The certificates which the Commission has issued describe in somewhat broad terms the type of transportation the specialists are authorized to perform. Thus, the ordinary heavy hauling certificate, which is the type that Dillner holds, authorizes the transportation of ". . . heavy machinery and such commodities which because of their weight and size require special equipment".

The purpose of the investigation before the Commission was to determine whether the Dillner certificate authorizes the transportation of such items as steel plates, sheets, bars, rods, pipe or firebrick—which are normally handled by motor carriers other than the heavy haulers and which, if individually offered, can be loaded and unloaded without special equipment—when offered in bundles, or other consolidations, requiring cranes for loading and unloading. Stated a little differently, the issue before the Commission was whether commodities which if shipped separately would clearly be outside the scope of the heavy

haulers' certificates become freight authorized to them when they are bundled or otherwise assembled into heavy loads which require some type of special equipment to load and unload them.

The Commission, after carefully analyzing the considerable testimony before it and after reviewing interpretations made by it of heavy hauling certificates in earlier instances, concluded that it is the nature of the individual commodity which determines whether it is within the category of freight authorized to the heavy haulers. Thus, individual items, for example, steel channels, which can be transported without the use of special equipment and can be loaded without cranes, may not lawfully be transported by the heavy haulers merely because when presented in bundles some type of special equipment is needed to load and unload them.

The test applied by the Commission did not originate and was not developed for the first time in this case. It is a test which has been utilized and applied by the Commission in many certificate interpretation cases. See *Black—Investigation of Operations*, 64 M. C. C. 443, 448 (1955); *H. J. Jeffries Truck Line, Inc., Extension—Nebraska*, 68 M. C. C. 191, 194 (1956); *Continental Tennessee Lines, Inc. v. Ligon*, 78 M. C. C. 319, 325 (1958); *Tarantola Extension—Radioactive Materials*, 81 M. C. C. 515, 518 (1959); *Ploof Transfer Co., Inc., Extension—Aluminum Pipe*, 82 M. C. C. 325, 330 (1960); and *Aero Trucking, Inc., Extension—Pipe*, 83 M. C. C. 97, 101 (1960).

Six years before the instant proceeding, in *Johnson Common Carrier Application*, 61 M. C. C. 783 (1953), when interpreting a certificate like Dillner's, the Commission in finding that the transportation of roller bearings was not authorized by a heavy-hauling certificate had said:

> "Although, as previously indicated, commodity descriptions used by us in certificates and permits have varied somewhat in the words actually used, we have not, so far as we are aware, ever authorized a grant of

> authority to transport 'shipments' as distinguished from 'commodities', and it is clear that there was no intention to depart from this practice herein. We threfore conclude that the individual commodity or commodities to be transported, as contrasted to a shipment in the aggregate, must be within the scope of the authority granted. Compare *Bareford Contract Carrier Application*, 32 M. C. C. 611, 614. Thus the test is whether the commodity or commodities severally are such as to require the use of special equipment for loading and unloading or over-the-road transportation, or both." (61 M. C. C. 791, 792.)

Because of the interpretation of its certificate, some of the transportation being performed by Dillner was found to be unlawful and therefore the Commission ordered the carrier to cease and desist from continuing it.

When asked to set aside the Commission' action, the court below held that the Commission's interpretation of the certificate must prevail unless it could be shown to be arbitrary, an abuse of discretion, or without evidence to support it. 193 F. Supp. 826, 828. As authority for this view it cited *Malone Freight Lines v. United States*, 107 F. Supp. 946, 949 (N. D. Ala. 1952), in which a three judge court stated the law in precisely the same way. *Malone* was affirmed by this Court upon motion.[1] Reliance was also placed upon the recent statements of this Court in *Service Transfer Co. v. Virginia*, 359 U. S. 171, 177. Applying this rule of law the court below concluded that the interpretation of the Commission was carefully made and was neither arbitrary nor without support in the evidence. The complaint was therefore dismissed.

The Jurisdictional Statement of the appellant does not challenge the rule of law utilized by the court below, nor does it specify any respects in which the rule of law was improperly applied to the circumstances. Rather it asks

1. 344 U. S. 925.

this Court to consider *de novo* matters which were before the Commission for initial determination. This Section 10 of the Administrative Procedure Act[2] makes clear it is neither the function of this Court nor of the court below. It would therefore seem apparent that the questions are unsubstantial and further argument would serve no purpose. While it is believed that this is a sufficient basis for granting this motion to affirm, the Railroad submits the following comments with respect to each of the questions presented in the Jurisdictional Statement as a further basis for granting the motion.

Question (a) is frivolous. Dillner is a "heavy hauler and rigger", and has been known as such throughout the industry for many years. The Commission has specific statutory authority to classify motor carriers by the services they perform under Section 204(b) of the Interstate Commerce Act, 49 U. S. C. § 304(b).

Question (b) is moot. Appellants never requested the Commission to enter an early order. Furthermore, Dillner continued to transport all of the commodities involved without restriction throughout the entire period the proceeding was pending before the Commission.

Question (c) is immaterial. The proceeding arose out of petition filed by competing motor carriers and by Dillner. The issue is whether or not there was substantial evidence of record before the Commission regardless of which of the parties presented it.

Question (d) is not entitled to consideration for the reason that it is based upon a false premise. The court below considered all of the certificated authority held by Dillner relating to the transportation of iron and steel articles and firebrick between points in Ohio, Pennsylvania and West Virginia.

Question (e) is also based upon a false premise. The court below stated a fundamental rule of appellate review,

2. 5 U. S. C. § 1009.

namely that the burden was upon Dillner, the Complainant, to show that the order and report of the Commission was clearly erroneous, capricious, arbitrary or not supported by substantial evidence.

Question (f) was reviewed by the court below. The Court found that there was no substantial difference between the recommended report of the Examiner and the report of the Commission. Furthermore, the Commission is not bound by the recommended report of its Examiner. See *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 496.

Question (g) is irrelevant. This statement by the court below was merely an observation of a possible result if the Commission's test were not applied in interpreting heavy hauling certificates.

Question (h) is irrelevant and immaterial. The court below merely found that the "grandfather authority" was not involved in the interpretation of Dillner's certificate and that at any rate Dillner had offered no evidence of its "grandfather operation" in the hearings before the Commission.

Question (k) is frivolous. Every motor carrier, and every shipper using a certificated motor carrier, has the obligation of determining whether the carrier is authorized to perform a requested transportation service prior to its being undertaken. No greater burden is required by the lower court's opinion in so far as heavy haulers are concerned.

Question (j) is not applicable to the case. There was no such finding or order.

Question (k). Appellants have no basis for raising this issue. The court below did limit itself to a review to determine whether the order of the Commission was erroneous, capricious, arbitrary, or supported by substantial evidence. The only exceptions were where the Court found it necessary to answer arguments or contentions advanced by appellants.

## THE RELIEF REQUESTED

It is most respectfully submitted that neither the issue actually involved, nor the matters referred to by appellants are of such substance or of such importance as to require further argument. The judgment of the District Court should therefore be affirmed.

Respectfully submitted,

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1138 Transportation Center,
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July 27, 1961.

**Proof of Service**

I, CARL HELMETAG, JR., one of the attorneys for The Pennsylvania Railroad Company, an intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of July, 1961, I served copies of the foregoing Motion to Affirm to the Supreme Court of the United States on the several parties as follows: (1) on the United States by mailing copies thereof in a duly addressed envelope, with postage prepaid, to the Honorable Robert Kennedy, Attorney General of the United States, Department of Justice, Washington 25, D. C.; (2) on the United States by mailing copies in a duly addressed envelope, with postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; (3) on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert Ginnane, Esq., its Chief Counsel at the Offices of the Commission, Washington 25, D. C.; (4) on the other parties by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows:

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

Office-Supreme Court, U.S.
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No. 188

W. J. DILLNER TRANSFER COMPANY, ET AL.,
*Appellants*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,
*Appellees*

**On Appeal from the United States District Court for the Western District of Pennsylvania**

## MOTION ~~OF INTERVENORS~~ TO AFFIRM

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IN THE

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*Appellees*

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**On Appeal from the United States District Court for the Western District of Pennsylvania**

---

## MOTION ~~OF INTERVENORS~~ TO AFFIRM

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Pursuant to Rule 16, paragraph 1(e) of the Revised Rules of this Court, B & P Motor Express, Inc., Continental Transportation Lines, Inc., Deioma Trucking Company, Detroit-Pittsburgh Motor Freight, Inc., Eazor Express, Inc., Helm's Express, Inc., Standard Motor Freight, Inc., The Glenn Cartage Company, The Lake Shore Motor Freight Company, The Regular Common Carrier Conference of the American Trucking Associations, Inc., Seattle Trucking Corporation, The Service Transport Co., and Wenham Transportation, Inc., intervening defendant-appellees, move to affirm the judgment of the United States District Court for the Western District of Pennsylvania on the ground that the questions

raised by appellants are so unsubstantial as not to warrant further argument.

## STATEMENT

These intervenors were authorized by the District Court to intervene as parties,[1] filed their brief and participated in oral argument, and appear here in support of the position of the United States of America and the Interstate Commerce Commission in this proceeding. The intervenors consist of twelve general commodity motor common carriers of property operating in interstate commerce pursuant to authority issued by the defendant Commission, and one association of some two thousand motor common carrier members. Because the interpretation sought by appellant W. J. Dillner Transfer Company, if approved, would greatly expand its operation, and therefore its competition and the competition of numerous other carriers with similar authority, the interest of these intervenors in the outcome of this controversy is indeed substantial.

The W. J. Dillner Transfer Company by petition to the Commission sought a declaratory judgment clarifying its authority to transport heavy commodities in interstate commerce. The Commission, acting thereon, instituted an investigation to determine what commodities Dillner may lawfully transport and whether said Dillner has been and is engaged in transporting commodities not within the scope of its authority (J.S. 73-74).

Dillner's certificate authorizes, inter alia, transportation of "such commodities which because of their weight and size require special equipment." After a hearing,[2] the

[1] Names initially omitted from the caption in the judgment of the court below but added by order of the court, dated May 31, 1961, upon motion of intervenors to correct clerical error of omission.

[2] Other dockets not here important were considered at the same time.

filing of briefs and other pleadings, and oral argument before the entire Commission, the report assailed was issued. It reasserted the principle[3] that it is the size and weight of the individual commodities themselves and their inherent nature, rather than the size and weight of the aggregated bundles or packages thereof, that determines whether the special equipment of the heavy hauler is required (J.S. 56, 66). While agreeing in part with appellant Dillner and in part with the Examiner, the Commission differed, also, in part, and concluded that Dillner's transportation of certain bundled articles of iron and steel and palletized firebrick is outside that carrier's certificated authority (J.S. 62, 64).

The Commission denied petitions for reconsideration. (J.S. 76-85). Upon complaint filed, and hearing by the statutory district court, the latter sustained the Commission's report and order and dismissed the complaint (J.S. 14-25). *W. J. Dillner Transfer Company* v. *I.C.C.*, 193 F. Supp. 823 (W.D. Pa. 1961).

## ARGUMENT

This Court is requested by appellants to review an order of the Interstate Commerce Commission involving that Commission's construction of certain motor carrier operating authority issued to appellant Dillner by said Commission. The assailed finding of the Commission was that Dillner was engaged in the transportation of "steel channels, plates, sheets, bars, rods, pipe, coils, rolling-mill rolls, and firebrick, in bundles or packages or fastened on skids; that such commodities are not required by their inherent nature to be aggregated in quantities of such size and weight that they are incapable of being

[3] Already well established in such cases as *Johnson Common Carrier Application*, 61 M.C.C. 783, 792 (1953); *L. C. Jones Trucking Co., Extension—The Dakotas*, 62 M.C.C. 539, 541 (1954); *Aero Trucking, Inc., Extension—Pipe*, 83 M.C.C. 97, 101 (1960).

loaded and unloaded manually; and that such commodities are not commodities which because of their weight or size require special equipment . . ." and that such transportation has been in violation of appellant Dillner's certificate (J.S. 67).

The basic question in the court below, and as properly seen by that court (J.S. 17-18) was "whether the Commission erroneously, arbitrarily or capriciously interpreted the certificate of the Dillner Company as conferring no rights to transport certain bundled articles of iron and steel and palletized firebrick." That the question before the Commission was one of certificate interpretation is seen both in its opinion (J.S. 26-72) and in its order setting the investigation. (J.S. 73-74).

The Commission's report dealt at length with a number of decisions, including *Black—Investigation of Operations*, 64 M.C.C. 433 (1955), wherein the Commission has consistently held that mere aggregation of units of a commodity does not bring the transportation thereof into the heavy hauling field (J.S. 54).

The burden on appellant here, and in the court below, was to demonstrate that the order of the Commission was clearly erroneous. Clearly, the Commission is empowered to interpret certificates and permits issued by it. *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503 (1944); affirmed, 324 U. S. 824. Further, this Court in *Andrew G. Nelson, Inc.* v. *United States*, 355 U. S. 554 (1957) stated that "a subsequent construction of the 'grandfather' permit by the Commission is controlling on the courts unless clearly erroneous." (P. 558).

Speaking of the appellant's burden, the court below said:

> ". . . We do not feel that Dillner has met the burden imposed by law. It is not our function to set aside the report merely because we might or might not

> differ with the Commission. We must act when we find that the report and order is not supported by substantial evidence. The burden is upon Dillner to prove this to the Court. It has not met this burden of proof, and, therefore, an appropriate order will be entered dismissing the complaint." (J.S. 24)

If it be appellant's position, as its Jurisdictional Statement seems to suggest, that it is being denied "grandfather" rights to which it might have been entitled, the *Nelson* case, supra, (P. 561, 562) speaks to the point in saying that "the carrier's recourse is to petition the Commission to reopen the grandfather proceeding for consideration of the evidence not previously brought to the Commission's attention."

In reaching their respective conclusions both the Commission (J.S. 39) and the lower court considered all of appellant's heavy hauler authority (J.S. 15). Dillner has identified no authority relevant to the issues before the Commission which either the Commission or the court refused to consider.

The appellants urge that the court and the Commission ignored and disregarded the findings of the hearing examiner who presided at the hearing. That the Commission gave recognition to the examiner's findings and likewise made adequate findings of its own is seen in its report wherein it adopted those findings in large measure and, in fact, carefully discussed and evaluated the examiner's views (J.S. 31, 63-67). After adopting in substantial degree the examiner's conclusions respecting Dillner's commodity authority, and taking a different view on a limited group of commodities, the Commission said, "Except to the limited extent indicated above, we agree with the conclusions of the examiner. . . . (J.S. 64-65).

Discussing the different treatment accorded by the examiner and the Commission to the alleged right of

Dillner to haul firebrick, the court below, speaking of the Commission's report, said:

> ". . . The decision of the Commission which denied Dillner the right to transport this firebrick demanded careful scrutiny by the Court . . . a careful reading of the testimony shows their final conclusion to be based on substantial evidence . . . It was more than a mere scintilla of evidence in support of the Commission's finding."

After carefully considering the variance between the respective treatment accorded the several commodities by the examiner and by the Commission, the court summarized the situation in these words:

> ". . . It would appear that their main difference was in determining which overall products were aggregated due to their inherent nature and which overall products were aggregated for economy purposes. The Commission set forth in its report wherein it differed with its examiner . . . and that is all it is required to do. We might point out that the difference here did not go to the credibility of witnesses in a situation in which the examiner's opinion ought to be given considerable weight but rather its interpretation and meaning of terms and the Commission's decisions in those cases are for the Commission rather than for the Examiner in the final instance. And, of course, there is no rule that holds that the Commission may not differ from its hearing examiner. See *Zinett* [*Sinett*] v. *United States*, 136 F. Supp. 37." (J.S. 23-24).

It is suggested (J.S. 3, 11) that the Commission has deprived the shipping public of the right of determining the manner and form of preparing goods for shipment. It should suffice that nowhere in the Commission's assailed report and order can there be found language restricting and impairing the rights of the shipping public to adopt any means it may seek to package and ship its goods. Moreover, none of the shipping public is here before the Court making such allegation. The Commis-

sion's position is simply that the discharge of the shipper's functions is not to be used to determine what interpretation should be given to a certificate issued by the Commission, nor to enlarge its scope. The Commission has the primary duty to interpret its certificates. "It appears clear that interpretation of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177 (1959). Moreover, such an interpretation once made, is entitled to stand unless clearly wrong or arbitrary. *United States* v. *Interstate Commerce Commission*, 189 F. 2d 816 (1951).

There is here a large economic issue important to general commodity carriers and embraced within the Commission's duties under the National Transportation Policy, 49 U.S.C., preceding § 1, 54 Stat. 899. The court observed this issue when it saw that to accept a different view of the rights of heavy haulers might put them into "the hauling of china cups or wooden nutmegs." (J.S. 22). Although appellants did not press the point in the court below their transportation objective before the Commission was to expand their commodity coverage by an ultra liberal interpretation of their certificate description, "commodities which because of their weight and size require special equipment." In recent years technological advancement has produced labor saving devices such as power driven "fork lifts" which lift and load palletized aggregations of almost innumerable commodities, light as well as heavy in their individual capacity. To adopt a view contrary to that taken by the Commission, and sustained by the court below, so as to allow appellants, relying upon technology and not upon their certificates, to handle palletized firebrick, or bundles of bars, rods, steel channels, and similar items, would open the door to endless expansion of heavy hauler authority. Such a

result would correspondingly and inevitably erode the traffic of the general commodity carrier and impair that stability of the nation's transportation system which the Commission by the National Transportation Policy is enjoined by Congress to promote.

While the real issue before the court below was whether the Commission, in interpreting Dillner's certificate acted erroneously, arbitrarily or capriciously and without substantial evidence, that issue is not here raised by appellants, or, at least, not developed. The issues which are raised are purely incidental and ancillary. Their resolution does not warrant the full consideration of this Court.

## CONCLUSION

We submit that the decision below is clearly correct in upholding the order of the Interstate Commerce Commission. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The judgment of the district court should be affirmed.

Respectfully submitted,

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August 1961

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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 188

W. J. DILLNER TRANSFER COMPANY, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA*

## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a final judgment, entered on April 26, 1961, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought to set aside a report and orders of the Interstate Commerce Commission. Appellant Dillner is a common carrier by motor vehicle

of "heavy machinery and such commodities which because of their weight and size require special equipment." In a proceeding to determine the scope of Dillner's authorized operations, the Commission held, after full administrative proceedings, that the carrier was not entitled to transport certain bundled or aggregated articles of iron and steel and palletized firebrick.

The Commission noted that the commodities transported by Dillner consisted of (1) certain articles of steel and iron each individual piece of which is of such size and weight that it cannot be loaded manually but requires the use of a crane or other special device (called "Group 1" commodities) and (2) certain articles of iron and steel and firebrick each individual piece of which could be manually loaded without special equipment but which are tendered to the carrier in bundles or packages or on pallets in such quantity and aggregate weight as to require the use of special loading equipment ("Group 2" commodities). All of the commodities in both groups are loaded and unloaded with cranes or other special devices furnished and operated by the shippers and receivers at their own expense (J.S. 63); the over-the-road movement of these commodities is provided by Dillner in "ordinary flat-bed vehicles" commonly used for the transportation of general commodities and involving the use of no special equipment.[1]

[1] If any item "requires" special equipment and service and hence is authorized to be transported as a heavy commodity, the Commission has held that it is immaterial whether such special equipment or service is provided by the heavy-hauler or by the shipper or receiver. *National Automobile Transporters Assn.* v. *Rowe Transfer*, 64 M.C.C. 229.

Noting that the traditional indicium of heavy-hauling has been a holding out to transport articles that because of their size, shape, weight or other considerations require special equipment for either loading, unloading or hauling, the Commission concluded that in construing such operating authority "the commodity itself is the controlling consideration" (J.S. 56), notwithstanding the fact that bundling or aggregating may be more efficient or economical and may result in a total bundle requiring special handling equipment. "Otherwise," the Commission said (J.S. 56), "there would hardly be any end to which the practice of aggregation might permit the heavy hauler to invade the general-commodity field, contrary to the public interest and contrary to the clear purport of its operating authority."

Applying these standards to the commodities being transported by Dillner, the Commission held (J.S. 64) that firebrick and certain enumerated iron and steel items did not by their inherent nature require bundling or aggregation. The Commission held, however, that certain steel sheets and plates falling within Group 2, insofar as their size and weight were concerned, required aggregation for shipping, because they were individually fragile and unstable, "so that the bundle actually constituted the commodity itself" (J.S. 62). Transportation by Dillner of all of the Group 1 commodities was held to be within its operating authority (J.S. 64). With respect to the Group 2 items, the Commission held that only steel sheets and plates, which required bundling in order to afford safe transportation, fell within the scope of Dillner's certificate;

transportation of the other items, aggregated for purposes of efficiency and economy only, was found not to be authorized by the certificate (J.S. 62, 64). The Commission accordingly ordered Dillner to cease and desist from the operations found to be unlawful (J.S. 5-6).

Applications for reconsideration were denied by the full Commission (J.S. 76-85) and on April 26, 1961, the three-judge district court unanimously sustained the Commission's report and orders (J.S. 14-25).

## ARGUMENT

As the district court noted (J.S. 19), this case involves "the simple question [of] what is meant by the phrase, 'such commodities as because of their weight and size require special equipment.'" After extensive administrative proceedings,[2] the Commission concluded that the right of a heavy-hauler to transport such commodities did not embrace the transportation of certain bundled articles of iron and steel and palletized firebrick, the inherent nature of which did not require aggregation for the protection of the several

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[2] Appellants' contentions (J.S. 2) that these proceedings were conducted in violation of various provisions of the Administrative Procedure Act (5 U.S.C. 1001, *et seq.*) are without merit. There is nothing in Section 6(a) of the Act (5 U.S.C. 1005(a)) that precludes a Commissioner who did not hear oral argument from participating in a final decision of the agency. See *Quon Quon Poy* v. *Johnson*, 273 U.S. 352, 357; *Eastland Co.* v. *Federal Communications Commission*, 92 F. 2d 467, 470, certiorari denied, 302 U.S. 735. Nor is any burden of proof question presented by this case. There was no real dispute as to the evidence, most of which was entered by stipulation, and the only question was whether the Commission's construction was a reasonable one, supported by "reliable, probative, and substantial evidence." See 5 U.S. 1006(c).

items. It is axiomatic that the interpretation of a certificate issued by the Commission is primarily a question for the agency (*Service Transfer Co.* v. *Virginia*, 359 U.S. 171) and will be sustained "unless clearly erroneous" (*Nelson, Inc.* v. *United States*, 355 U.S. 554, 558). The district court held that the challenged orders of the Commission were not shown to be clearly erroneous or to be lacking in substantial evidentiary support (J.S. 24). We submit that this decision is correct and that the present appeal presents no real or substantial question calling for further review by this Court.

1. The Interstate Commerce Commission has long certificated a class of specialized motor common carriers, familiarly known as "heavy haulers," who are authorized to carry commodities that require the employment of special loading or hauling equipment. See *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 710. The Commission has traditionally looked to the size and weight of the individual unit of the commodity sought to be transported in determining whether its loading, unloading, or road transportation requires the use of special equipment (J.S. 46). The only departure from this rule has been with respect to articles whose nature or composition precludes individual handling. The heavy haulers have been permitted to transport such goods where the bundles required for their protection are too large or heavy to be transported without special equipment. *Black—Investigation of Operations*, 64 M.C.C. 443, 446, 447.

In construing Dillner's certificate, the Commission did no more than to view the articles that Dillner

claimed to have a right to handle in the light of these established principles. Thus, single-unit iron and steel items that could not be loaded and unloaded manually, but required special hoisting equipment, were held to be within the scope of the carrier's operating authority. On the other hand, iron and steel items that were sufficiently small and light, as well as strong enough, to permit manual loading and unloading were held to be beyond the scope of the certificate, irrespective of whether the bundles in which they were packaged for purposes of efficiency and economy were of such weight and size as to require special devices (J.S. 64).[3] The district court concluded that "[t]he Commission's test is a reasonable test" (J.S. 22). It thought that the case of palletized firebrick presented "a difficult question" that "demanded careful scrutiny by the Court" (J.S. 21), but decided (*ibid.*) that the Commission's findings (J.S. 64) that firebrick could be hauled unpalletized and that "[n]either custom, usage, nor modern loading and shipping practices" brought the commodity within the ambit of the heavy hauler were "properly supported" by the record (J.S. 22). In short, the district court agreed with the Commission that to per-

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[3] The hearing examiner had concluded, contrary to the Commission, that Dillner ought to be permitted to transport aggregate loads of steel and firebrick even though such aggregation was merely a matter of convenience. But, as the district court pointed out (J.S. 23), the Commission was not bound by the recommendations of its examiner and "the difference here did not go to the credibility of witnesses in a situation in which the examiner's opinion ought to be given considerable weight but rather [to the] interpretation and meaning of terms," a matter "for the Commission rather than for the Examiner in the final instance." See also *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 496.

mit the mere act of aggregation to control the scope of the carrier's authority could well have extended the heavy hauler's certificate to cover the hauling of practically all commodities (*ibid.*).[4]

2. Appellants also appear to contend (J.S. 3, 11) that the district court erred in holding that the Commission was under no obligation to consider Dillner's alleged "grandfather operations" pursuant to which it secured its certificate as a carrier of commodities requiring special equipment for their loading, unloading or transportation. But the court was clearly correct in concluding that, in the absence of any showing by the carrier that it had in fact transported the questioned articles during the critical period for securing grandfather rights, the Commission was not required to pursue the matter (J.S. 24). Moreover, as this Court held in *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561-62:

> [I]n the event the grandfather permit does not correctly reflect the scope of the grandfather operation, the carrier's recourse is to petition the Commission to reopen the grandfather proceedings * * * Such a contention is no answer to the present charge of permit violation, since the

[4] The Commission's action in this case in no way interferes with the "right and privilege" (J.S. 3) of the shipping public to determine the manner and form in which commodities shall be prepared for shipment by motor carriers. It merely prohibits a motor carrier of heavy commodities from expanding its operating rights at the expense of general-commodity carriers by means of aggregated shipments. If a shipper wishes to ship goods not requiring aggregation in bundles or on pallets, he may do so but must use the general-commodity carrier.

permit cannot be collaterally attacked [citations omitted]. To hold otherwise would render meaningless the congressional requirement of a permit to continue grandfather operations subsequent to the Act.

CONCLUSION

The appeal presents no substantial question warranting further review, and the judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

NO. 188

W. J. DILLNER TRANSFER COMPANY, et al.
Appellants,

v.

UNITED STATES OF AMERICA et al.
Appellees

On Appeal From the U. S. District Court for the Western District of Pennsylvania.

## APPELLANTS' REPLY TO MOTIONS TO AFFIRM

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## APPELLANTS' REPLY TO MOTIONS TO AFFIRM

This is in reply to three separate motions to affirm but in the interest of brevity we shall follow the most recent motion filed, by the Solicitor General. All three motions follow the same form and it is unnecessary to discuss each one separately. Before taking up the points of argument, attention is directed to a new and very helpful decision. Since filing the Jurisdictional Statement, appellants' counsel has learned of a recent decision by a three judge court in the Northern District of California, dealing with one of the questions involved in the case at bar. It is quite obvious that the case at bar should have been reversed and remanded as was done in the cited case. Annexed hereto is appendix "A"; a verbatim copy of the above mentioned decision in Civil Action 39237 U. S. District Court, N.D. of California, Southern Division.

## STATEMENT IN REPLY

The statements made on Pages 1 and 2 of the Solicitor General's motion to dismiss are substantially correct except that the scope of the investigation is improperly stated at the top of Page 2. A correct statement of the scope of the investigation will be found on Page 4 of the same document, and also in the first paragraph of the order marked Appendix "C" (P. 73JS.) The statements made on Pages 3 and 4 are substantially correct except that the footnote on Page 4 is quite erroneous. The provisions of the Administrative Procedure Act are applicable to proceedings before the Interstate Commerce Commission. The statements on Page 5 are substantially correct except to the extent that the conclusions expressed are in error.

Appellant Dillner is a motor common carrier of malt beverages, household goods, heavy machinery, and commodities which because of weight and size require special equipment and also such commodities as because of their weight or size require special equipment. There is no language in its certificate such as "heavy hauler" or "rigger" (See Exhibit A-1, annexed to the Original Complaint, Document 1). The classification decision cited at 2 M.C.C. 703 does not contain the phrase "heavy hauler". The statements on Pages 6 and 7 are substantially correct. On Page 8 the conclusion reached by the Solicitor General is entirely erroneous.

## ARGUMENT IN REPLY

In the case at bar appellant Dillner repeatedly urged its original "grandfather" rights but the Commission ignored such requests. Annexed hereto as, appendix "B" is a copy of the original "grandfather" order dated September 14, 1942. Even a casual comparison of the language of the last paragraph of this certificate:

> *Heavy Machinery,* and *such commodities which, because of their weight and size, require special equipment.*
>
> Between points and places in Allegheny County, on the one hand, and, on the other, points and places in West Virginia, Ohio, and New York.

with the first paragraph of the order made by the Commission in M.C.C. 1766, February 7, 1955 (P. 73-Jurs. St.) confirms that the Commission deliberately restricted its investigation to the context of a subsequent certificate and in disregard of Dillner's "grandfather" rights. (P. 15 J.S.) The Examiner recognized this existing authority in his report.

Thus we have a situation wherein the Commission failed and refused to perform its functions and even refused to discuss the issue in the Court below. (P. 24, J.S.) The Commission's investigation was so limited at its inception, as to exclude consideration of the "grandfather" rights. (P. 39 J.S.) (P. 19 J.S.)

The Commission is bound by law to consider all of Dillner certificated authority regardless of whether it be called "grandfather" or not; and this the Commission has not done.

**Firebrick**

The Commission declared its attitude regarding the transportation requirements of firebrick on October 21, 1939, prior to the date when Dillner accepted its first certificate. In a well reasoned opinion the Commission in *Central Territory Motor Carrier Rate,* 19 M.C.C. 545-600, recognized that firebrick, are moved in special motor equipment and are not ordinarily transported by Motor Carriers of general commodities. See annexed Appendix "C". Similar findings were made with regard to iron and steel in the same proceeding at, 23 M.C.C. 435; the Commission said in clear language, on May 27, 1940 that articles of iron and steel in truck load shipments of 20,000 lbs. or more, required special equipment to transport. Do better roads and bigger trucks work to modify operating certificates, legally, after a lapse of 25 years?

**Confusion of Both Shippers and Carriers**

It is clear beyond doubt that the Commission has not considered or determined the full operating scope of all of appellants' authority. (See Ex. A-1 annexed to Original Complaint, Doc. 1). Surely that unadjudicated portion includes structural steel regardless of size or weight of the shipments, and fire brick. And what is structural steel? The Commission has said in many prior decisions that channels, bars, rods, and etc. are structural steel. *App. Carroll Trucking Company,* 63 M.C.C. 348-351. Thus appellant is now ordered to cease and desist from hauling structural steel and other items for which it has clear authority. The complaints which did attack the "grandfather" authority were dismissed, by the Commission. It is clear that the District Court

misconceived its duty in denying relief under the Administrative Procedure provisions of the law, in the case at bar. In oral argument, the court agreed with appellants' counsel on nearly all questions, but upon decision the Court indicates that while the sympathy of the court is still with us, the law does not permit them to disturb the decision of the Commission even though it may be wrong. This is error, which destroys the heart of our legal process. (See Appendix "D" annexed hereto.)

Counsel respectfully refers to Senate Document 248-79th Congress, 2nd Session, entitled Administrative Procedure Act, Page 216-217. Congress intended "diligent enforcement by reviewing courts." Debates in both houses also indicate that the burden of proof was meant to be imposed upon the agencies in cases of this type. In conclusion attention of the Court is directed to the fact that the Commission's decision did not even mention that Appellant had sought to obtain review of its complete authority; the only notice taken was in the Order rejecting it. (Appendix C, page 74 J.S.)

The decisions of the Court below and the Commission are honeycombed with conflicts of law and questions of weak and contrary evidence.

## IS THE ISSUE OF "GRANDFATHER" RIGHTS MATERIAL?

Surely this case will never be settled finally or fairly unless and until all of Dillners operating rights are ajudicated.

The Commission accepted the evidence of such rights upon stipulation of facts at the opening of the

first hearing. If proper consideration had been accorded to such evidence the Commission could and should have held that the words "Heavy Machinery" were and are a catch phrase denoting a certain group of articles and commodities and, that any and all other cargoes of similar nature are included "ejusdem generis", just as was done in *App. Hutchinson Transp. Co.*, 19 MC 437. See appendix D annexed hereto. Firebrick is a building material. Opposing Counsel do not dispute the existence of the prior rights, but they contend that such rights are not material to the issues here involved.

Appellants Counsel cannot predict with certainty what connotation the Commission may now attribute to the words "Heavy Machinery" but it is essential that every word be given effect to produce a "rational basis" of interpretation.

There can be no peace until justice is done. The Courts are not empowered to perform administrative functions for the Commission but they are authorized and directed to compel action by the Commission.

**Summary**

The Commission had no "bundling rule" when Dillner's first Certificate was issued. Indeed there is no official "building rule", yet; nor any mention of such theory prior to 1956. The term "heavy-hauler" had not been coined and the so-called general commodity haulers, did not haul steel or firebrick prior to 1942. There has been a concerted effort here to impose the recently conceived "bundling rule" upon the original "heavy machinery" authority involved herein, without benefit of decision or report by the Commission.

(P. 62., J.S.). Dillner is entitled to a fair and complete determination of all its rights. The Examiner's report is so involved here that it must be read with the decisions of the Court below and the Commission; the Commission was far from truth and justice when it reduced the density of cold rolled steel from 480 lbs per cubic foot down to about 48 lbs; according to his comments concerning sizes and weights, the Examiner thought that a steel bar three inches square and fifty feet long would weigh only 50 lbs, and a steel plate thirty feet long, eight feet wide and two inches thick would weigh only 2,000 lbs. A little arithmetic establishes the above bar weight at 5000 lbs. and of the plate at 20,000 lbs. Physical facts cannot be altered even by the Commission. All of the testimony on the subject of sizes and weights came from the opposition witnesses and related to the articles hauled by them, not by Dillner. (P. 40 & 41. J.S.) There is no specific or probative evidence against Dillner. The articles involved in the case at bar are all of varying sizes and weights, even firebrick.

Justice requires that the instant Order of the District Court be reversed and remanded with appropriate instructions to correct its errors.

Respectfully submitted,

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Attorney for Appellants.

Dated Aug. 23rd 1961

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant,
and
INTERSTATE COMMERCE COMMISSION,
Intervening Defendant.

Civil Action No. 39237

Before: HON. GILBERT H. JERTBERG
U.S. Circuit Judge
HON. LOUIS E. GOODMAN, Chief Judge
U.S. District Judge
HON. LLOYD H. BURKE
U.S. District Judge

**Per Curiam and Order**

Plaintiff holds so-called "grandfather" certificates issued by respondent Commission on November 26, 1947 and September 7, 1943 authorizing the transportation of "general commodities, except liquid petroleum products in bulk, in tank trucks", over specified routes.

On July 31, 1957 plaintiff sought from the respondent Commission an order for clarification of its present authority to transport petroleum based *chemicals* in tank vehicles over its authorized routes. The clarification sought was a determination that petro-chemicals are *not* "Petroleum products". Plaintiff had been transporting

petroleum chemicals under the claimed authority of its certificates. The application of July 31, 1957 sought to resolve doubts as to whether the plaintiff's transportation of petroleum chemicals was lawful under the certificates.

Upon the hearing of this application plaintiff offered evidence to support its claimed right to transport such chemicals on the ground that they were not considered by the parties to be "petroleum products" at the time of the issuance of the "grandfather" certificates. The Commission rejected this evidence upon the ground that it was immaterial on the question of clarification tendered but that it would be material if modification or amendment of the original certificates were sought. The Commission denied plaintiff's application but its finding was "without prejudice to the filing of a petition for modification of the 'grandfather' certificates".

The record shows that the Commission has not since its decision (July 27, 1959) issued any order requiring plaintiff to desist and refrain from the transportation of the chemicals.

We now have before us a petition of the plaintiff for interlocutory and permanent injunction, and for a decree setting aside and annulling the Commission's order of July 27, 1959.

We are of the opinion that the order of the Commission under attack is not such an order as is reviewable by this Court in the present state of the record. The Commission has not, nor does it threaten to issue a desist order against plaintiff. Its decision specifically leaves the door open for further proceedings by plaintiff to obtain relief in a proceeding to modify the "grandfather"

certificates. Thus there is no irreparable injury presently threatened which bespeaks the Court's equitable jurisdiction. Plaintiff has not yet exhausted the clear administrative remedy still open to it. *Nelson v. United States*, 355 U.S. 554; *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499.

For its guidance, it is our view that the Commission should admit the rejected evidence before making any order respecting the authority of plaintiff under its certificates.

The petition is dismissed.

Dated: March 6th, 1961.

GILBERT H. JERTBERG
United States Circuit Judge

LOUIS E. GOODMAN
United States District Judge

LLOYD H. BURKE
United States District Judge

## APPENDIX B

### Certificate of Public Convenience and Necessity

NO. MC 21623

JOHN H. DILLNER and ALBERT G. DILLNER, a Partnership, Doing Business as W. J. DILLNER TRANSFER & STORAGE COMPANY, Pittsburgh, Pennsylvania

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th day of September, A. D., 1942.

AFTER DUE INVESTIGATION, it appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foregn commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

*Malt Beverages,*

From Pittsburgh, Pa., to points and places in that part of West Virginia on and north of U. S.

Highway 33, and those in that part of Ohio on and east of U. S. Highway 21, and

*Empty containers for malt beverages,*

From the above-specified destination points to Pittsburgh, Pa.

*Household goods,* as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

Between points and places in Allegheny, Westmoreland, Fayette, Washington, and Beaver Counties, Pa., on the one hand, and on the other, points and places in Illinois, Maryland, Michigan, New Jersey, New York, Ohio, Virginia, West Virginia, and the District of Columbia.

*Heavy Machinery,* and *such commodities which, because of their weight and size, require special equipment,*

Between points and places in Allegheny County, on the one hand, and, on the other, points and places in West Virginia, Ohio, and New York.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonable continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL
Secretary

(SEAL)

## APPENDIX C

### Central Territory Rates 19 MCC 600

Hunter Builder's Supply Company, of Streator, Ill., a subsidiary of the Hunter Lumber Company, asks exemption of rates on clay products, namely, common or face brick, drain tile, septic tanks, chimney firebrick, barium sewer pipe, flue-lining firebrick, wall coping, and fire clay, from the requirements of the orders previously entered herein. The exemption is sought only insofar as it would affect the rates charged by petitioner between points in La Salle and Livingston Counties, Ill., on the one hand, and sections of Iowa and Indiana, on the other.

Petitioner is operating as both a common carrier and a contract carrier. Its status under the provisions of the act has not yet been finally determined.

The reasons advanced for the exemption requested are (1) that the commodities described are transported in special equipment with long base and low sides and are such as are not ordinarily transported by common carriers of general commodities, (2) that the only rates prescribed for application on any of the commodities are the sixth-class rates, minimum 20,000 pounds, and (3) that deliveries of the commodities are usually made to construction sites, many of which are not located on State or Federal highways, and it is difficult to determine and observe the rates prescribed as minimum.

*The request to exclude firebrick and related commodities was granted.*

## APPENDIX D

### Application of Hutchinson Transp. Co. 19 MCC 437

Next most important are a number of commodities which are so related in use and handling that they should be considered together as a class. They are machinery, mining and contractors' supplies and equipment, steel, lumber, cement, pipe, acids, chemicals, and other building supplies. Applicant, as stated, is especially equipped for the handling of extremely heavy machinery and other commodities to or from remote or off-route construction jobs or places of use and has specialized in this type of service.

*This application was granted by the Commission.*